Supreme Court, U.S.
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In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corporation et al.*, Nos. 08-1553 and 08-1554 (consolidated) ("*Regal-Beloit*"), this Court will decide (*inter alia*) whether the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §11706 (rail carriers), *id.* §14706 (motor carriers), applies at all to the inland rail portion of an international, multimodal import shipment governed by a "through" bill of lading (*i.e.*, a bill of lading that covers the shipment from origin to destination). If this Court determines that Carmack does apply to such shipments, it will clarify the ICA's requirements for contracting out of Carmack. Relying solely on its decision in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006) ("*Sompo I*"), the Second Circuit held in two related cases that the Carmack Amendment applies to such shipments and that parties may not contract out of Carmack unless terms consistent with Carmack are first offered directly to the overseas shipper. The question presented is:

Whether the Second Circuit erred by holding, in conflict with other circuits, that the Carmack Amendment displaces the liability terms that the carriers, shippers, and shipping intermediaries agreed would govern these international "through" import shipments.

LIST OF PARTIES

1. Petitioner Union Pacific Railroad Company ("UP") was a defendant in the district court in both related cases. UP was an appellant in the Second Circuit in No. 07-5190-cv and an appellee-cross-appellant in Nos. 05-7039-cv(L)[1], 07-4739-cv(XAP).

2. Respondent Sompo Japan Insurance Company of America ("Sompo") was a plaintiff in the district court in both related cases. Sompo was an appellee in the Second Circuit in No. 07-5190-cv and an appellant-cross-appellee in Nos. 05-7039-cv(L), 07-4739-cv(XAP).

3. Respondent Olympus America, Inc. was a plaintiff in the district court in No. 02-civ.-9523 (S.D.N.Y.) and an appellant-cross-appellee in the Second Circuit in Nos. 05-7039-cv(L), 07-4739 (XAP).

4. Norfolk Southern Railway Company was a defendant in the district court in No. 02-civ.-9523 (S.D.N.Y.) but was dismissed from the case by stipulation on August 25, 2004. Stipulation and Order of Dismissal (Docket No. 21). Norfolk Southern was not a party in the court of appeals.

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[1] No. 05-7039-cv(L) was disposed of by stipulation filed December 5, 2007. Order Withdrawing Appeal by Consent Without Prejudice (2d Cir. Dec. 5, 2007)

RULE 29.6 STATEMENT

Union Pacific Railroad Company was formerly known as the Southern Pacific Transportation Company. Union Pacific Corporation owns 62.6 percent of Union Pacific Railroad Company's stock and also wholly owns the Southern Pacific Rail Corporation. Union Pacific Corporation has issued publicly traded securities, and Union Pacific Railroad Company has issued publicly traded debt securities.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit (Pet.App.1a-4a) and of the United States District Court for the Southern District of New York (Pet.App.68a-91a) are unpublished.

JURISDICTION

The Second Circuit entered its opinion and judgment in these cases on August 13, 2009. On August 27, 2009, Union Pacific filed timely petitions for rehearing *en banc*, which were denied on October 6, 2009 (Pet.App.92a-94a). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the Carmack Amendment, 49 U.S.C. §§11706 and 14706, other relevant provisions of the Interstate Commerce Act (codified at Title 49), and the Carriage of Goods by Sea Act, 46 U.S.C. §30701 (Notes), are reproduced at Pet.App.95a-152a.

STATEMENT OF THE CASE

International containerized shipping has revolutionized the shipping industry and now accounts for more than $1 trillion each year in U.S. trade. Most cargo in foreign trade is now transported in sealed containers that are carried both by sea on ships and by land on trains or trucks. Modern industry practice is for the shipper to arrange for the entire transportation of its goods carried in these containers on a "through" contract basis, thereby making "'efficient use of all available modes of transportation by air, water, and land.'" *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 25 (2004) (quoting 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* 589 (4th ed.

2004)). Five years ago in *Kirby*, this Court held that a U.S. railroad was entitled to rely upon and enforce the liability limitations to which the shipper agreed in the through bill of lading issued by an ocean carrier, against a claim for more damages under state law.

This case is essentially identical to *Kawasaki Kisen Kaisha Ltd., et al. v. Regal-Beloit Corporation, et al.* (No. 08-1553) and *Union Pacific Rail Company v. Regal-Beloit Corporation, et al.* (No. 08-1554) (consolidated) (collectively, "*Regal-Beloit*"), in which this Court granted certiorari on October 20, 2009. As in *Regal-Beloit*, the overseas shippers here have attempted to plead around this Court's holding in *Kirby* by relying not on state law but on a federal liability regime—the Carmack Amendment to the Interstate Commerce Act. The related cases below involve shipments of containerized goods from Japan to the United States under a through bill of lading. In each case, the through bill called for the extension of the limited liability provisions of the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (46 U.S.C. §3701 (Notes)) ("COGSA") to the inland rail carriage. The Second Circuit held in both cases that the Carmack Amendment applies to, and provides the liability terms governing, the shipments at issue. The Second Circuit further held that the railroads and the shipping intermediaries directly contracting for rail carriage could not contract out of Carmack's requirements unless Carmack-compliant terms had first been offered to the original shippers in Japan.

This Court granted certiorari in *Regal-Beloit* to resolve (*inter alia*) whether the Carmack Amendment applies at all to the inland rail portion of an international, multimodal import shipment governed

by a through bill of lading, and to clarify the requirements for contracting out of Carmack if it does apply. Because this case presents the same set of questions, it should be held pending this Court's decision in *Regal-Beloit* and then disposed of accordingly.

Statutory Background

The relevant statutory schemes and the pertinent history are explained in detail in the briefs filed by Union Pacific and the United States in *Regal-Beloit*. We will summarize them only briefly here.

1.a. In 1887, Congress enacted the ICA and created the ICC to regulate railroad transportation. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. The ICC's jurisdiction extended to every rail carrier engaged in transportation of property or passengers between two States, to, from, and within territories, "from any place in the United States to an adjacent foreign country," and "from any place in the United States through a foreign country to any other place in the United States," as well as to shipments of property "from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." *Id.*

In 1906 Congress added the Carmack Amendment, which applied *only* to "transportation from a point in one State to a point in another State," and established a liability regime under which the first carrier (the one "receiving property for transportation" directly from the shipper) was liable for any damage occurring in the whole shipment, including on the lines of other

connecting or delivering carriers, with a right of recoupment from the carrier on whose line the damage actually occurred. Act of June 29, 1906, ch. 3591, §7, 34 Stat. 584, 595. (Subsequent amendments have imposed similar liability on the "delivering," or final carrier. *See* 49 U.S.C. §11706(a)). Courts have characterized Carmack as imposing on carriers "'something close to strict liability.'" *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 59 (2d Cir. 2006) ("*Sompo I*") (citation omitted). It essentially codified the common law rule that a carrier is liable for damage caused by the railroad and its employees, even without negligence, but not for acts of God or of a public enemy. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 506-10 (1913). The current version of Carmack preserves the parallel common law rule that the railroad's liability may be limited "to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." 49 U.S.C. §11706(c)(3)(A); *see also id.* §14706(c)(1)(A) (motor carriers).

In the 1915 Cummins Amendment, Congress extended the scope of Carmack to include "transportation ... from any point in the United States to a point in an adjacent foreign country." Act of Mar. 4, 1915, ch. 176, 38 Stat. 1196, 1197. That remained the statutory language from 1915 until 1978. *See* 49 U.S.C. §20(11) (1976). It was settled law throughout that period, in the courts and at the ICC, that the plain language of Carmack did not extend to the inland leg of import shipments (or exports to non-adjacent countries) moving under a through bill of lading. *See, e.g., In re Cummins Amendment*, 33 I.C.C. 682, 693 (1915); *Alwine v. Pa. R.R. Co.*, 15 A.2d 507 (Pa. Super.

Ct. 1940); UP *Regal-Beloit* Opening Br. at 29 (filed Dec. 23, 2009) (collecting cases). This Court's decisions during that time period were consistent with that settled understanding. *See, e.g., Mo. Pac. R.R. Co. v. Porter*, 273 U.S. 341, 342 (1927); *Reider v. Thompson*, 339 U.S. 113, 117 (1950); UP *Regal-Beloit* Opening Br. at 31-33.

In 1978, Congress passed a bill prepared by the Office of Law Revision Counsel in order to recodify the entire ICA and enact it into positive law. That bill expressly provided (in statutory text, not legislative history) that the recodification was "without substantive changes," and "may not be construed as making a substantive change in the laws replaced." *See* Pub. L. No. 95-473, §3(a), 92 Stat. 1337, 1466; *see also* H.R. Rep. No. 95-1395, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018 (Congress intended to "make[] no substantive change in the law"). In an apparent attempt to streamline the phrasing, the codifiers replaced the longstanding and precise description of Carmack's scope with a reference to "transportation under this subtitle." 92 Stat. at 1453. Carmack was again reenacted in 1995 without any change to the relevant language, except that it now refers to "transportation under this part." Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, 834 (codified at 49 U.S.C. §11706(a)).

After similar amendments to simplify the language and to replace the ICC with the new Surface Transportation Board ("STB" or "Board"), the ICA's jurisdictional provision now extends to rail carriers engaged in transportation within the United States that is "between a place in ... the United States and a

place in a foreign country." 49 U.S.C. §10501(a).

b. From 1976 to 1980 Congress undertook an expansive deregulation of the rail industry. The Railroad Revitalization and Regulatory Reform Act of 1976 created a mechanism through which the STB may "exempt" a carrier, class of carriers, or a particular service from some or all of the ICA's regulatory requirements. Pub. L. No. 94-210, 90 Stat. 31, 42 (1976) (codified as amended at 49 U.S.C. §10502(a)).

In 1980, Congress passed the Staggers Rail Act. Pub. L. No. 96-448, §2, 94 Stat. 1895, 1896-97 (1980) ("Staggers") (finding that "regulations affecting railroads have become unnecessary and inefficient" and "greater reliance on the marketplace is essential"). Among other things, Congress added to the exemption provision a subsection explicitly authorizing the STB "to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." Staggers, §213, 94 Stat. at 1913 (codified at 49 U.S.C. §10502(f)). The Board has exercised that authority. *See* 49 C.F.R. §§1090.1(a)(4), 1090.2. The Board "may specify the period of time during which an exemption granted under this section is effective," 49 U.S.C. §10502(c), and retains the power to "revoke an exemption," *id.* §10502(d). Such "exempt" carriage thus remains subject to the Board's jurisdiction. *See* Improvement of TOFC/COFC Regulation, 46 Fed. Reg. 14,348, 14,351 (Feb. 27, 1981) ("Nothing in this exemption shall be construed to affect our jurisdiction ....").

Congress also added a provision explaining that an exemption by the STB under §10502(a) does not itself "relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are

consistent with the provisions of [the Carmack Amendment]," but also that "[n]othing in this subsection or [Carmack] shall prevent rail carriers from offering alternative terms nor give the [Board] the authority to require any specific level of rates or services based upon the provisions of [Carmack]." Staggers, §213(e), 94 Stat. at 1913 (codified at 49 U.S.C. §10502(e)).

Staggers also added §10713 (Staggers §208, 94 Stat. at 1908, now codified as amended at 49 U.S.C. §10709), which permits "[o]ne or more rail carriers providing transportation subject to the jurisdiction of the Board" to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." §10709(a). Parties to a §10709 contract "shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract," and the contract "may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of [the ICA]." §§10709(b), (c)(1). The service provided under such contracts is therefore "exempt ... from all regulation and all of the requirements of the Interstate Commerce Act," H.R. Rep. No. 96-1035, at 100 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978, 4132, including Carmack.

2. a. COGSA "is the culmination of a multilateral effort 'to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (citation omitted).

A bill of lading is a contract recording that a carrier has received certain goods from a shipper and

establishing other conditions that "govern[] the relationship of the parties before delivery of the goods." 1 Schoenbaum, *supra*, at 621. Historically, ocean bills of lading were not uniformly enforceable in all nations. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-43 (2d ed. 1975). That "distressing lack of uniformity in shipping practice and law" prompted efforts to establish "uniform international regulation of the rights and duties of carriers of ocean cargo." 1 Schoenbaum, *supra*, at 636.

The Hague Rules of 1921 established uniform international law governing the carriage of goods by sea. In 1936, Congress implemented those rules (as amended by international convention in 1924) by enacting COGSA. *Sky Reefer*, 515 U.S. at 536-37.

b. COGSA governs "[e]very bill of lading ... for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. §30701 (Notes). It guarantees shippers' rights against carriers and establishes the carriers' minimum liability to shippers for cargo damage or loss. (Notes Secs. 2-4.)

By its terms, COGSA applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship," the so-called "tackle-to-tackle" period. (Notes Sec. 1(e).) But the statute also permits the carrier and shipper to agree to COGSA terms for "the entire period in which the [cargo] would be under [the shipper's] responsibility, including the period of the inland transport." *Kirby*, 543 U.S. at 29 (citing (Notes Sec. 7)). "[C]ontractual extension of COGSA is now routine in the shipping industry." *Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007). A so-called "clause paramount" in a bill of lading may extend COGSA's liability rules beyond

the tackle-to-tackle period to the cargo's final destination. A "Himalaya clause" extends the terms of the bill of lading, including the contractual extension of COGSA, to parties with whom the ocean carrier has subcontracted for inland transportation.

c. Under COGSA, the parties may agree to a liability limitation. The default (and minimum) liability cap is $500 per package. (Notes Sec. 4(5).) Shippers and carriers typically opt to retain COGSA's liability limitation; shippers pay a reduced transport rate that reflects the carriers' reduced risk, and (like the shippers in this case) obtain private insurance for the excess value of their goods. *Kirby*, 543 U.S. at 19-21 (citation omitted).

Facts and Proceedings Below

The two related cases below involve facts that are nearly identical to each other and to the facts underlying the *Regal-Beloit* case of which this Court has already granted review.

1. *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, No. 07-5190-cv. In July 2002, Kubota Tractor Corporation contracted with ocean carrier Mitsui OSK Line Ltd. ("MOL") to ship thirty-two tractors from Tokyo to Georgia. MOL issued three through bills of lading. Pet.App.6a. Although the MOL bills of lading provided Kubota an opportunity to declare full value liability rates, Kubota opted to ship the goods for a lower rate in exchange for a $500 per package liability limitation pursuant to COGSA. Pet.App.9a-10a. Typical of industry practice, the bills of lading included both a Himalaya clause (extending the terms and benefits of the bill of lading to subcontractors) and a clause paramount (extending COGSA liability terms to the inland rail transport). Pet.App.8a-10a.

MOL contracted with CSX Intermodal ("CSXI") to arrange inland transportation from Los Angeles to Georgia. CSXI, in turn, sub-contracted with UP to provide transportation by rail for that leg of the journey. Pet.App.70a-71a. UP's contract with CSXI incorporated UP Exempt Circular 20-B, which limited UP's liability to $500 per package for goods moving pursuant to an ocean through bill of lading and also offered CSXI the option of Carmack terms.. Pet.App.71a; *see also* 07-5190-cv Second Circuit Court of Appeals Joint Appendix at 173, 175, 257. (Circular 20-B was the predecessor to UP's Master Intermodal Transportation Agreement, or MITA, which is discussed in the *Regal-Beloit* briefing, *see, e.g.*, UP *Regal-Beloit* Opening Br. at 38-43.) Following a train derailment in Texas, Kubota recovered the full value of its claimed loss from its insurer, Respondent Sompo, in the amount of $479,500. Sompo brought suit against UP in the Southern District of New York to recover the amount it paid to its insured. Pet.App.7a.

UP and Sompo cross-moved for partial summary judgment. UP argued that, pursuant to the terms of the through bill of lading and UP's contract with CSXI, UP's liability is limited to $500 per package. Pet.App.7a-10a. Sompo moved "to dismiss UP's 'package limitation defense,'" arguing that UP is liable for the full amount of actual damages pursuant to the Carmack Amendment and that Carmack "'cannot be departed from by private contract.'" Pet.App.5a, 10a-11a (quoting Clause 5 of the bill of lading).

The district court held that UP could enforce the liability limitation in the through bill of lading. Pet.App.8a-12a. The court explained that "parties may depart from the unlimited liability provision of the

Carmack Amendment by contract," and that the default terms supplied by Carmack are "replaced by the provisions found in Clause 29 of the MOL bills of lading." Pet.App.11a-12a.

The Second Circuit reversed, holding that the Carmack Amendment applies to the inland portion of the shipment and trumps the parties' attempt to extend COGSA inland by contract. *Sompo I*, Pet.App.22a-66a. The Second Circuit recognized that the pre-1978 statutory language controls the meaning of Carmack, and acknowledged the *Alwine* line of cases holding that the language ("from any point in the United States to a point in an adjacent foreign country") meant what it said, and did not embrace import movements on a through bill of lading. Pet.App.43a-49a. The Second Circuit nonetheless held that "from ... to" must be interpreted to include "to ... from" because of this Court's decision in *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920), which interpreted a different provision of the ICA. Pet.App.48a-50a. The court of appeals acknowledged that even under its own reasoning Carmack still would not apply to imports from *non-adjacent* countries, but held that it was required to ignore the statutory limitation to "adjacent" countries because of prior Second Circuit precedent that had not recognized the issue. Pet.App.49a n.13.

Having held that Carmack applies, and the Second Circuit further held that under 49 U.S.C. §10502(e) the parties could contract out of its terms only if "the shipper" was given an option to select shipping terms consistent with Carmack. Pet.App.63a-65a. It remanded the case so that the district court could

consider whether that requirement had been satisfied. Pet.App.66a.

On remand, the parties renewed their motions for partial summary judgment. Pet.App.69a. UP argued that because the MOL through bill of lading offered Kubota liability terms consistent with Carmack, as did UP's contract with its own customer, CSXI, any conceivable prerequisite for contracting out of Carmack had been satisfied. Pet.App.73a, 76a-77a. The district court disagreed. The district court held that, under *Sompo I*, UP could not contract out of Carmack with its direct customer, CSXI, unless *Kubota* was "on notice of a choice between a limitation in liability and an offer of Carmack liability." Pet.App.76a-77a.[2]

2. *Sompo Japan Ins. Co. of Am., et al. v. Union Pac. R.R. Co.*, Nos. 05-7039-cv(L), 07-4739(XAP). In November 2001, Olympus Optical Co. ("Olympus") shipped four containers of digital cameras from Tokyo, Japan for delivery at Woodbury, New York. Pet.App.14a. Olympus had contracted with Kawasaki Kisen Kaisha ("'K'-Line") to arrange door-to-door transportation of the shipment from Tokyo to Woodbury under a through bill of lading. Pet.App.14a-

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[2] The district court further stated in dicta that even if Kubota had notice of UP's Circular 20-B, UP had not established that the circular offered Carmack liability terms for "international shipments." Pet.App.77a-78a. As explained in UP's opening brief in *Regal-Beloit* (at 45), a shipping intermediary such as CSXI could have arranged the shipment such that "the foreign portion of the journey terminated at the border of the United States," *Reider v. Thompson*, 339 U.S. at 117, and could have contracted with UP for a separate domestic movement originating in the United States.

15a. The bill of lading provided for a liability limitation of $500 per package throughout the shipment, unless Olympus opted to declare the full value of the goods. Pet.App.15a Olympus declined to declare full value, opting instead for a lower shipping rate and the $500 per package liability limit. Pet.App.20a. The bill of lading also included both a Himalaya clause and a clause paramount, extending the COGSA liability terms to any subcontractor carriers. Pet.App.15a.

"K"-Line's agent, RailBridge Corporation, subcontracted with UP for the rail portion of the shipment from Washington to New York on terms previously agreed to by UP and "K"-Line in a long-term contract, the Exempt Rail Transportation Agreement ("ERTA"). Pet.App.16a. The ERTA incorporated UP Exempt Circular 20-B, which provided that UP's liability would be limited to $500 per package and which also gave "K"-Line the option to select Carmack liability terms. Pet.App.83a-84a; *see also* 07-4739-cv Second Circuit Court of Appeals Joint Appendix at 64, 70, 72-73.

One of the containers was apparently burglarized somewhere en route and some of the cameras were stolen. Pet.App.16a. Olympus' insurer, Respondent Sompo, covered Olympus' loss in the amount of $430,000 and sued UP, as Olympus' subrogee, to recover that sum. Pet.App.13a, 16a. Based on the express terms of the through bill of lading and the ERTA, UP brought a motion for partial summary judgment seeking to limit its liability to $500 per package. Pet.App.13a-17a.

The district court held that Carmack does not apply where the shipment is governed by a through bill of lading. Pet.App.19a-21a. Relying on *Kirby*, the court

held that the Himalaya clause clearly extended the terms of the "K"-Line/Olympus bill of lading to downstream carriers such as UP and that UP's liability was therefore limited to $500 per package. Pet.App.20a-21a. The parties then stipulated to a judgment in the amount of $8,000.

While Respondents' appeal to the Second Circuit was pending, the Second Circuit issued its ruling in *Sompo I*. In light of that ruling, Respondents brought a motion to vacate the judgment pursuant to Federal Rule of Civil Procedure 60(b), asserting that the court's summary judgment ruling was inconsistent with *Sompo I*. The district court agreed and vacated its earlier summary judgment ruling on December 15, 2006. Pet.App.67a.

Shortly thereafter, the district court stayed proceedings in light of this Court's grant of certiorari in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), because it (like the *Regal-Beloit* case now pending before this Court) involved the precise issues decided by *Sompo I*. Pet.App.80a.

When *Altadis* settled, 549 U.S. 1189 (2007), the district court resumed proceedings and rejected UP's contention that it had satisfied any prerequisite for opting out of Carmack. Pet.App.81a, 87a-90a. The district court believed that "the burden to offer full Carmack liability is on the rail carrier," Pet.App.88a, and found that the bill of lading "failed to make mention of the Carmack Amendment's actual full liability terms, and they are never offered as an option for the shipper to choose." Pet.App.89a. As in the related case, the district court here believed that UP could not contract out of Carmack with its direct

customer unless *Olympus* was on notice of the offer of Carmack terms. Pet.App.89a-90a.[3]

3. UP filed a motion to consolidate the two cases in the court of appeals. UP Motion to Expedite Appeal and Consolidate Appeals, Nos. 07-4739-cv, 07-5190-cv (2d Cir. filed Dec. 14, 2007). The court denied that motion but agreed to treat the cases as related and submitted them to the same merits panel. Order Denying Motion to Consolidate Appeals, Nos. 07-4793-cv, 07-5190-cv (2d Cir. filed Dec. 26, 2007). On appeal, UP argued that *Sompo I* was wrongly decided and that UP was entitled to enforce the terms of the bill of lading under this Court's decision in *Kirby*. UP also renewed its argument that it had satisfied *Sompo I*'s prerequisite for contracting out of Carmack.

In two separate but identical unpublished summary orders, the Second Circuit affirmed the district courts' rulings, noting that there had been "no intervening Supreme Court decision that would call into question the rationale of *Sompo I*" and that it was therefore "bound by [that] prior precedent." Pet.App.2a, 4a. The court did not address UP's alternative argument that it had contracted out of Carmack, even under *Sompo I*'s view of the world. The Second Circuit denied UP's

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[3] As in the related case, the district court further found that even if Olympus were on notice, UP's circular did not offer Carmack terms for this shipment. Pet.App.90a. As explained above, *supra* n.2, that is incorrect as a factual matter. In any event, as the Second Circuit's summary affirmance demonstrates, the district court's judgment rests on *Sompo I*'s holdings that Carmack applies and that rail carriers may not contract out of Carmack unless the overseas shipper directly is offered a Carmack option. *See* Pet.App.1a-2a.

petitions for rehearing without opinion on October 6, 2009. Pet.App. 92a-94a.

REASONS FOR GRANTING THE WRIT

In these two related cases the Second Circuit has reaffirmed its holdings in *Sompo I* that the Carmack Amendment applies to import shipments covered by a through bill of lading and that parties may not opt out of Carmack unless Carmack terms are first offered to the original shipper abroad. As explained in UP's opening merits brief in *Regal-Beloit* (at 16), *Sompo I* was a stark departure from the settled rule for nearly a century that "'the Carmack Amendment has no application to goods received for shipment at a point outside the United States.'" (Quoting *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 463-64 (E.D. Pa. 1979) (collecting cases).) Relying on 49 U.S.C. §10502(e), *Sompo I* also held that parties cannot contract out of Carmack unless Carmack-compliant alternative shipping terms are first offered directly to the overseas shipper.

The Ninth Circuit followed both holdings of *Sompo I* in *Regal-Beloit*, *see Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985 (9th Cir. 2009), and this Court has granted review of both issues. Merits briefing is already underway in *Regal-Beloit* (petitioners' opening briefs were filed on December 23, 2009), and the case presumably will be scheduled for argument and resolved this Term. This case presents the same issues, and if this Court reverses the Ninth Circuit's judgment in *Regal-Beloit* it will almost certainly be appropriate to grant and reverse—or at a minimum GVR—this case as well. Accordingly, this petition should be held pending this Court's decision in *Regal-Beloit* and then granted and reversed or

remanded, as appropriate, in light of this Court's decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Regal-Beloit* (Nos. 08-1553 & 08-1554), and then granted and reversed or remanded, as appropriate, in light of this Court's decision.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, and Olympus America, Inc., Plaintiffs-Appellants-Cross-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant-Appellee-Cross-Appellant, Norfolk Southern Railroad Company, Defendant.

Nos. 05-7039-cv(L), 07-4739-cv(XAP).*

August 13, 2009.

2009 WL 2476569

SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the judgment of the district court entered September 27, 2007, is **AFFIRMED.**

Defendant Union Pacific Railroad Company ("Union Pacific") appeals from a judgment entered September 27, 2007, granting plaintiffs' motion for summary judgment. We assume the parties'

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* Nos. 05-7030-cv(Lead) is disposed of by stipulation filed December 5, 2007.

familiarity with the facts and procedural history of this case.

On appeal, Union Pacific argues, in effect, that our prior decision in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co. ("Sompo I")*, 456 F.3d 54 (2d Cir.2006), was wrongly decided and should be vacated. However, "[t]his court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc.*" *In re Sokolowski*, 205 F.3d 532, 534-535 (2d Cir.2000) (per curiam) (alteration in original and internal quotation marks omitted). Union Pacific points to no intervening Supreme Court decision that would call into question the rationale of *Sompo I.* Therefore, we are bound by the prior precedent of this Court. For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOMPO JAPAN INS[illegible]ANCE COMPANY OF AMERICA, Plaintiff-Appellee,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant-Appellant,

No. 07-5190-cv.

August 13, 2009.

2009 WL 2476574

SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the judgment of the district court entered October 23, 2007, is **AFFIRMED**.

Defendant Union Pacific Railroad Company ("Union Pacific") appeals from a judgment entered October 23, 2007, granting plaintiffs' motion for summary judgment. We assume the parties' familiarity with the facts and procedural history, and specification of issues on appeal.

On appeal, Union Pacific argues, in effect, that our prior decision in *Sompo Japan Insurance Co. of*

America v. Union Pacific Railroad Co. ("Sompo I"), 456 F.3d 54 (2d Cir.2006), was wrongly decided and should be vacated. However, "[t]his court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc.*" *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir.2000) (per curiam) (alteration in original and internal quotation marks omitted). Union Pacific points to no intervening Supreme Court decision that would call into question the rationale of *Sompo I.* Therefore, we are bound by the prior precedent of this Court. For the foregoing reasons, the amended judgment of the district court is AFFIRMED.

United States District Court,
Southern District of New York.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA,
Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

No. 03 Civ. 1604(RCC).
November 5, 2003.

2003 WL 22510361

MEMORANDUM AND ORDER

DUFFY, J.

Sompo Japan Insurance of America ("Sompo" or "plaintiff") brings this action against Union Pacific Railroad Company ("UP" or "defendant") to recover the cost paid to the insured, Kubota Tractor Corporation ("Kubota") for tractors damaged en route to Swanee, Georgia. Liability for the damaged goods is not in dispute. The only issue is the extent of UP's liability. Sompo moves for partial summary judgment to dismiss UP's "package limitation defense." The defendant moves for partial summary judgment to determine the extent of UP's liability for the damaged goods.

Background

In July of 2002, Mitsui OSK Line Ltd. ("MOL" or "Carrier") shipped 32 Kubota tractors, valued at $479,500.00, from Tokyo, Japan to Swanee, Georgia. (Plaintiff's Local Rule 56.1 Statement of Facts ("Plaintiff's R. 56.1 Statement"), ¶ 1.) Three "intermodal" or "through bills of lading"[1] were issued by MOL to Kubota covering the entire shipment from Tokyo to Georgia. *Id.* ¶ 2. The backside of the bills of lading contains various provisions dealing with the liability of the carrier and others involved in the transport of the goods.

Upon arrival in the United States, the goods were placed on UP railcars for the remainder of the journey.[2] (Sheldon Aff. ¶ 4.) UP issued electronic waybills for this leg of the trip. (Sheldon Aff. ¶ 10.) These waybills make no reference to a limit of liability but do refer to "SPD-5152"; the contract between CSXI and UP.[3] (Sheldon Aff. ¶ 11-12).

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[1] The terms "waybill" and "bill of lading" are used interchangeably by both parties in their submissions, even though Sompo argues that they are quite different. For present purposes the distinction, if any, is not important. I will refer to the contract between MOL and Kubota as a bill of lading.

[2] There is some dispute as to who contracted with UP in making the rail arrangements. According to UP the arrangement was made by CSX Intermodal ("CSXI"), a freight forwarder, which is evidenced on the UP contract of carriage. (Sheldon Aff. ¶ 8.) However, Marubeni America Corporation ("MAC"), who assisted MOL in making the shipping arrangements, states that "[a]t no time did MAC or to our knowledge Kubota make any shipping arrangements with a company called CSXI[.]" (See Tanebe Decl. ¶ 6.)

[3] According to UP, the waybills contain a typographical error. The waybills furnished by UP should state "CUSTOMER

While the goods were transported by UP, the train derailed in Texas resulting in damage to the cargo. (Plaintiff's R. 56.1 Statement ¶ 5.) Upon notification of the loss, Sompo paid the insured, Kubota, $479,500 in settlement of the loss. (*Id.* ¶ 7.) Sompo, as subrogee of Kubota's claims, now moves for partial summary judgment to dismiss UP's "package limitation defense." UP cross-moves for summary judgment to determine the extent of their liability.

Discussion

Summary judgment may be granted only when "there is no issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Since the only issue to be determined is the extent of UP's liability according to the various provisions of the contracts of carriage, summary judgment is appropriate. *See Adirondack Transit Lines, Inc. v. United Transportation Union, Local 1582,* 305 F.3d 82, 85 (2d Cir.2002) ("The proper interpretation of an unambiguous contract is a question of law for the court, and a dispute on such an issue may properly be resolved by summary judgment.")

UP argues that it is an intended beneficiary of the MOL Bill of Lading and that it may exercise the defenses available to MOL by way of clause 29 of the bill of lading and the Carriage of Goods by Sea Act ("COGSA"), 49 App.U.S.C. § 1300 *et seq.* The COGSA provides for a $500 limit on liability "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 49 App. U.S.C. § 1304(5).

FURNISHED CONTRACT DATA-SPT 005152" as opposed to "SPD-005152." (Sheldon Aff. ¶ 11.)

Bills of lading that purport to extend the protections of the COGSA beyond the Act's typical period of applicability are to be strictly construed and "limited to intended beneficiaries." *Lucky-Goldstar Int'l (America), Inc. v. S.S. California Mercury*, 750 F.Supp. 141, 145 (S.D.N.Y.1990) *quoting Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 305, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959). Furthermore, the extension of such limited liability provisions "must be clearly expressed." *Toyomenka Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 520-21 (2d Cir.1975).

The MOL bills of lading contain numerous provisions, which when read together clearly express that UP is an intended beneficiary of the limited liability provision of the COGSA by way of the shipping contract with MOL.

Clause 4 titled "SUB-CONTRACTING AND INDEMNITY," (otherwise known as a "Himalaya" clause) states:

(1) The Carrier shall be entitled to sub-contract the Carriage on any terms whatsoever.

(2) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or Sub-Contractor of the Carrier ...

Without prejudice to the foregoing, every such servant, agent and Sub-contractor shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for their benefit, and in entering into this contract, the Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such servants, agents and Sub-Contractors. (Sheridan Decl. Ex. A (emphasis added).)

Section 1, entitled "DEFINITIONS," defines "Sub-Contractor" as "owners and operators of vessels and Space providers of Vessels other than the Carrier ... *inland carriers, road, rail and air transport operators, any independent contractor directly or indirectly employed by the Carrier in performance of the Carriage, their respective servants or agents, and anyone assisting in the performance of the Carriage.*" (Sheridan Decl. Ex. A (emphasis added).)

These two provisions make it quite apparent that the Carrier or anyone in its employ for the purposes of this carriage, including rail carriers, may avail themselves of MOL's applicable defenses.

The applicable defense is found in Clause 29, titled "US CLAUSE PARAMOUNT." It states:

(1) If the carriage covered by this bill of lading includes Carriage to or from a port or place in the United States of America, this Bill of Lading shall be subject to the United States Carriage of Goods by Sea Act 1936 (U.S. COGSA), the terms of which are incorporated herein and shall govern *throughout the entire Carriage set forth in this Bill of Lading.* Neither Clause 5(1)(a), (b), the Hamburg Rules nor the Visby Amendments shall apply to the Carriage to or from the United States. *The Carrier shall be entitled to the benefits of the defences [sic] and limitations in the U.S. COGSA, whether the loss or damage to the Goods occurs at sea or not.*

(2) If the U.S. COGSA applies as Clause 29(1) above, neither the Carrier nor the Vessel shall, in any event, be or become liable for any loss or damage to or in connection with the Goods in an amount exceeding $500.00 per package, lawful money of the United States, or in case of goods not shipped in packages, per

customary freight unit, unless the value of the Goods has been declared and inserted in the declared value box on the face hereof, in which case Clause 6(2) shall apply. (Sheridan Decl. Ex. A (emphasis added).)

It is evident from the documents provided by Sompo that Kubota never declared the value of the goods on the face of the relevant documents per the requirements of Clause 29(2). (*See* Sheridan Decl. Ex. A.) Since the carriage of the tractors included carriage "to or from a port or place in the United States," the COGSA governs throughout the entire carriage. As set forth in the Bill of Lading, this encompasses the movement of the goods from Tokyo, Japan to Swanee, Georgia by way of Los Angeles, California. Furthermore, the Himalaya clause, by way of Clause 4, covers not only MOL, with whom Kubota contracted with directly, but also UP who is defined as a "sub-contractor" pursuant to Clause 1. Thus, UP is subject to the limited liability provisions found in the contract.

Sompo argues that under Clause 5, entitled "CARRIER'S RESPONSIBILITY", UP cannot avail itself of the COGSA liability limitations and is subject to the Carmack Amendment and the unlimited liability provision applicable to inland carriers. 49 U.S.C. § 11706 (2003). This argument is without merit.

Clause 5 states that the Carrier (and thus UP by way of the provisions discussed above) is responsible for the loss of goods during carriage in only specific circumstances. In pertinent part, Clause 5 states:

(1) If the stage of the carriage during which the loss or damage can be proved, the liability of the Carrier shall be determined: ...

(b) except where the loss or damage is proved to have occurred during the Waterborne Carriage, by the

provisions contained in any international convention or national law which provisions:

(1) *cannot be departed from by private contract to the detriment of the Merchant;* and

(2) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of the carriage during which the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable; and

(3) would have been applicable if the contract referred to in 2) above had been governed by the internal law of the State where the loss or damage occurred. (Sheridan Decl. Ex. A (emphasis added).)

It is clear from the plain meaning of Clause 5(1)(b)(1) that only provisions in national or international law that "cannot be departed from" are applicable to this carriage. The Carmack Amendment is not such a law. Indeed, numerous cases recognize that the Carmack Amendment may be departed from by contract and supplanted by the COGSA to the detriment of the merchant. *See Toshiba International Corp. v. M/V "Sea Land Express"*, 841 F.Supp. 123, 125 (S.D.N.Y.1994) ("It is [ ] wellsettled that the protections of COGSA and other provisions of the bill of lading may contractually be extended to third party agents of the carrier, such as inland carriers."); *see also Aisin Seiki Co. Ltd. v. Union Pacific Railroad Company*, 236 F.Supp.2d 343 (S.D.N.Y.2002); *Tokio Marine & Fire Ins. Co., Ltd. v. Hyundai Merchant Marine Co., Ltd.* 717 F.Supp. 1307 (N.D.Ill.1989); *Mori Seiki USA, Inc. v. M/V/ Shin Kashu Maru*, 702 F.Supp. 613 (N.D.Tx.1988). Furthermore, parties may depart

from the unlimited liability provision of the Carmack Amendment by contract. 49 U.S.C. § 10502(e) (2003); *Tamini Transformatori S.R.I. v. Union Pacific Railroad*, 2003 WL 135722 at *4 (S.D.N.Y. Jan.17, 2003) ("[A] shipper and a carrier may bargain for alternative terms, so long as a shipper has the option of receiving 49 U.S.C. § 11706 terms.") (citations omitted). Thus, the Carmack Amendment does not meet the first requirement of Clause 5(1)(b)(1) and is replaced by the provisions found in Clause 29 of the MOL bills of lading.

Therefore, plaintiff's motion for partial summary judgment is denied. Defendant's motion for partial summary judgment is granted to the extent that their liability is governed by the $500 per package limitation of Clause 29 in the MOL bills of lading.

SO ORDERED.

United States District Court,
Southern District of New York.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA,
Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

No. 02 Civ. 9523.
November 21, 2005.

2005 WL 3779036

ORDER

BATTS, J.

Sompo Japan Insurance Company of America ("Sompo") and Olympus America, Inc. ("Olympus") (collectively, "Plaintiffs") bring this action against Union Pacific Railroad Company ("UP" or "Defendant"), seeking damages for a stolen shipment of digital cameras. Presently before the Court is Defendant's motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking to limit Defendants' liability for the stolen goods to $500 per package. For the following reasons, Defendant's motion for partial summary judgment is GRANTED.

I. BACKGROUND

Plaintiff Olympus is a corporation organized and existing under the laws of the State of New York, with

its principal place of business in New York. (Complaint ¶ 2.) Plaintiff Sompo is an insurance company organized and existing under the laws of the State of New York with its principal place of business in New York. (*Id.* ¶ 3.) Defendant is a corporation organized and existing under the laws of Delaware with its principal place of business in Nebraska, with routas in the Southern District of New York, and is registered to do business in the State of New York. (*Id.* ¶ 4.)

On or about November 2001, Olympus Optical Co., Ltd shipped four containers of digital cameras from Tokyo, Japan, which were discharged from the M/V Hudson Bridge ship in Tacoma, Washington, for delivery by rail to Woodbury, New York. (Complaint ¶ 7; Def.'s Rule 56.1 Stmt ¶¶ 1-2; Pls.' Rule 56.1 Stmt ¶¶ 1-2.) Plaintiff Sompo insured the shipment. (Complaint ¶ 10.) All portions of the carriage of cameras "were part of an international and interstate transportation of goods." (Complaint ¶ 8.)

Kawasaki Kisen Kaisha ("K-Line") arranged the shipping and issued Olympus an ocean bill of lading ("B/L"), dated November 21, 2001[1] (Def.'s Rule 56.1

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[1] Plaintiffs argue that K-Line issued only a Waybill, and Defendants argue that a bill of lading was issued. Examining the contract, it is clear to the Court a bill of lading, which "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage" (*Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283, 390 (2004)) was issued, based on the fact that the terms and conditions attached to the contract use the term "bill of lading." For example, the top states, "None of the terms of this Bill of Lading can be waived by or for Carrier except by express waiver signed by Carrier or its duly authorized agent;" and "Combined Transport" is defined as meaning "carriage of Goods under this

Stmt ¶ 3; Complaint ¶ 7.) The B/L indicates on its face that the port of loading is Tokyo, Japan, the port of discharge is Tacoma, and the place of delivery is Woodbury Door. Several clauses of this B/L are relevant here. The B/L states in Clause 4, that if the United States Carriage of Goods by Sea Act (COGSA) applies, the carrier shall be liable for up to $500 per package "unless the nature and value of such Goods have been declared by the shipper before receipt of Goods by Carrier and inserted into this Bill of Lading." (Sheldon Aff. Ex. A.) Clause 24 pertains to limitation of liability and states explicitly, "Under no circumstances shall Carrier be liable for loss or damage in an amount exceeding the amount which can be assessed by Clause 3 or 4, as the case may be, unless the value of Goods higher than the amount so assessed has been declared in writing by Merchant before receipt of goods by Carrier and inserted on the face hereof...." (*Id.*) Clause 5 is what is commonly referred to as a "Himalaya" clause, and extends the terms and benefits of the bill of lading to subcontractors, including connecting carriers, and specifically states, "Merchant shall not make any claim against Participant(s) which imposes or attempts to impose upon any of them any liability in connection with Goods greater than that of Carrier under this Bill of Lading." (*Id.*)

Bill of Lading from the place of receipt from Merchant to the place of delivery to Merchant by Vessel plus one or more other mode of transport;" and "Merchant" is defined as including "the shipper, consignor, consignee, owner and receiver of Goods, and the holder of this Bill of Lading, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contracts and freight forwarders." (Def.'s Notice of Motion, Ex. A.) Accordingly, as the Court finds that a bill of lading was issued, that is the term it will use.

Defendant UP transported the containers from Tacoma, Washington to Chicago, Illinois, where one of the containers was burglarized and some of the cameras were stolen. (Def.'s Rule 56.1 Stmt ¶¶ 7-9.) This inland rail transportation was arranged by the Rail Bridge Corporation. (Def.'s Rule 56.1 Stmt ¶ 4.) At the time of the shipment, UP had entered into an Exempt Rail Transportation Agreement with K-Line and Rail Bridge Corp. (Def.'s Rule 56.1 Stmt ¶ 10.) UP issued an EDI waybill to RailBridge for the shipment, referencing the K-Line/UP contract. (Def.'s Rule 56.1 Stmt ¶ 11.)

Plaintiffs estimate value of the stolen goods is approximately $430,000, which is the amount of the insurance payment that Sompo paid to Olympus America. (Complaint ¶¶ 10, 11.)

II. DISCUSSION

A. Summary Judgment

A district court should grant summary judgment when there is no "genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see also Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 107 (2d Cir.2000). Genuine issues of fact cannot be created by more conclusory allegations; summary judgment is appropriate only when, "after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party." *Beublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir.1993) (citing *Matsushita Elec. Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed .2d 538 (1986)).

In assessing when summary judgment should be granted, "there must be more than a 'scintilla of

evidence' in the non-movant's favor; there must be evidence upon which a fact-finder could reasonably find for the non-movant." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A court must always "assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986); however, the non-movant may not rely upon "more speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Id.* at 12. Instead, when the moving party has documented particular facts in the record, "the opposing party must, 'set forth specific facts showing that there is a genuine issue for trial." ' *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir.1986) (quoting Fed.R.Civ.P. 56(e)).

B. Liability

Defendant argues its liability is limited to $500 per package, under the terms of the contract because the bill of lading was a through bill of lading that covered the entire international journey, and that the contract in question was an Exempt Rail Transportation Agreement, authorized by the Staggers Amendment.[2] (Def.'s Mem. at 6.)

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[2] Defendant also argues that UP's liability for the cargo loss is governed by applicable rules circulars, as referenced in the K-Line/UP contract, which limits liability to $500 per package, pursuant to COGSA, 46 U.S.C. § 1304(5). (Def.'s Mem. at 3.) Because the Court finds that the COGSA limitation of liability applies because the contract in question is a through bill of lading, and thus covers the entire shipment, it does not address Defendant's argument, or Plaintiffs' responses to this argument regarding the applicability of the EDI and Rail/UP contract and the corresponding rules circulars.

Plaintiffs argue that the K-Line contract, which it believes governs this dispute, offers liability under COGSA, not under the Carmack Amendment, and is not enforceable by Defendant railroad, thus they are entitled to full liability for their loss. (Pls' Mem. at 3.) Plaintiffs argue that the Interstate Commerce Act applies and under the Staggers Amendment, a shipper may not contract out of full Carmack liability without being given first an opportunity to opt for such liability. (Pls' Mem. at 12.) Accordingly, Plaintiffs argue that the COGSA-based limit of liability is unenforceable by rail carrier UP, and because Defendant did not offer the Carmack Amendment's actual full liability terms as an option for the shipper to choose, Plaintiffs are entitled to full liability for their loss. (Pls. Mem. at 12.)

"The Carmack Amendment governs the liability of common carriers for goods lost or damaged during a shipment in interstate commerce." *Ford v. Allied Van Lines, Inc.*, No. 96 Civ. 2598, 1997 WL 317315 at *2 (D. Conn. June 3, 1997). The Carmack Amendment applies to the domestic portion of an international shipment, "as long as the domestic leg is covered by a separate bill or bills of lading." *Allianz CP Gen. Ins. Co. v. Blue Anchor Line*, 2004 U.S. Dist. LEXIS 8175, at *13 (S.D.N.Y. May 7, 2004) (quoting *Swift Textile, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir.1986), cert. denied, 480 U.S. 935, 94 L.Ed.2d 768, 107 S.Ct. 1577 (1987)). This liability extends to a rail carrier operating pursuant to a bill of lading, holding the carrier liable for the actual loss of property. 49 U.S.C. § 11706. The Staggers Amendment to the Interstate Commerce Act requires that in contracts that include carriage of goods by rail, Carmack liability

provisions must be offered along with any limited liability provisions. 49 U.S.C. 10502.

"However, where the bill of lading governing the shipment is a 'through bill of lading,' the Carmack Amendment is inapplicable." *Id.* (citing *Insurance Co. of N. Am. v. S/S "Transworld Bridge,"* 1994 U.S. Dist. LEXIS 2597, No. 92 Civ. 7375, 1994 WL 75249 at *7 n.6 (S.D.N.Y. Mar. 7, 1994) and citing cases). A through bill of lading is one, "by which a carrier agrees to transport goods from origin to destination, even though different carriers (such as a railroad, trucker, or air carrier) may perform a portion of the contracted shipment." *Am. Home Assur. Co. v. Hapag Llovd Container Linie, GmbH,* 2004 U.S. Dist. LEXIS 15197, at *12 (S.D.N.Y. Aug. 4, 2004) (quoting *Hartford Fire Ins. Co. v. Orient Overseas Container Lines (UK),* 230 F.3d 549, 552 n.2 (2d Cir.2000) (citing *Mannesman Demag Corp. v. M/V Concert Express,* 225 F.3d 587, 588 n.3 (5th Cir.2000)). Factors to consider when analyzing whether a bill of lading is a through bill of lading include "(1) the final destination indicated in the bill of lading; (2) the conduct of the shipper and carriers; and (3) and whether the connecting carriers were compensated by the payment made to the initial carrier or by separate consideration from the shipper." *New York Marine & Gen. Ins. Co. v. S/S "Ming Prosperity",* 920 F.Supp. 416, 425 (S.D.N.Y.1996) (citations omitted). Where a through bill of lading is in operation, and thus the Carmack Amendment does not apply, and where no value of goods is inserted in the bill of lading, the limitation on liability of COGSA applies. *See, e.g., Agfa Gevaert AG v. TMM Lines Ltd., LLC,* 2005 U.S. Dist. LEXIS 18275, at *15 (S.D.N.Y. Aug. 25, 2005) ("Where, as here, the shipper does not

declare the value of its goods on the bill of lading, the $500 COGSA ceiling kicks in.") (citing 46 U.S.C.App. § 1304(5)).

Applying these elements to the instant case, the bill of lading identified the port of loading as Tokyo, Japan, the port of discharge as Tacoma, and the place of delivery as Woodbury Door. It is clear from the document that some ground transportation in the United States would be required, and Plaintiff Olympus did not enter into any agreements on its own to arrange for inland transportation-it left that up to K-Line. Plaintiff Olympia had the opportunity to insert the value of its goods on the bill of lading, as indicated in Clause 4 and Clause 24 of the B/L, but elected not to do so. Because the limited liability provisions of the intermodal bill of lading here are clear, the liability provisions extend to all stages of the transport of the goods. Therefore, Carmack does not apply, and the Staggers Amendment, which serves to limit Carmack liability is inapplicable, as well. Accordingly, as the contract is a through bill of lading, and no other value of the goods was inserted, the limited liability of COGSA applies.[3] Plaintiffs are entitled to a maximum liability of $500 per package.

As to whether the B/L applies to the connecting carrier, UP, Clause 5 of the B/L, the so-called "Himalaya clause," clearly extends the terms of the contract to all connecting carriers. Analyzing a similar

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[3] This finding is consistent with a case remarkably similar to the present one, where Judge Duffy found that Carmack Amendment liability may be departed from by contract, and supplanted by the COGSA to the detriment of the merchant. *Sompo Japan Ins. of Am. v. Union Pac. R.R.*, 2003 U.S. Dist. LEXIS 19757, at *10-11 (S.D.N.Y. Nov. 5, 2003).

Himalaya Clause in *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, the Supreme Court said that, "as the crow files, [the destination] is some 366 miles inland from the port of discharge" and therefore, "the parties must have anticipated that a land carrier's services would be necessary for the contract's performance." __ U.S. __, 125 S.Ct. 385, 397-98, 160 L.Ed.2d 283 (2004). The Court went on to find that the railroad carrier was the intended beneficiary of the clause in the bill of lading, and as such, that the railroad company's liability was limited by the terms of the clause. *Id.* Similarly, COGSA applies here to the connecting carrier, UP, and liability is limited to $500 per packet.

III. CONCLUSION

For the foregoing reasons, Defendant's partial motion for summary judgment is GRANTED.

The Joint Pre-trial Statement ("JPTS"), Requests to Charge and Proposed Voir Dire are to be filed no later than February 17, 2006; Memoranda of Law addressing those issues raised in the JPTS also are to be filed no later than February 24, 2006; Responses to the Memoranda are to be filed no later than March 10, 2006. All submissions shall be in accordance with the Individual Practices of Judge Deborah A. Batts, available at: www.nysd.uscourts.gov/Individual_Practices/Batts.pdf.

SO ORDERED.

United States Court of Appeals,
Second Circuit.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant-Appellee.

Docket No. 04-4066-CV.
Argued: July 14, 2005.
Decided: July 10, 2006.

456 F.3d 54

Before: WESLEY and HALL, Circuit Judges, and TRAGER,[1] District Judge.

WESLEY, Circuit Judge:

A shipment of thirty-two tractors, en route from Tokyo, Japan to Swanee, Georgia, was severely damaged when the train carrying the cargo derailed in Texas. The cargo owner, Kubota Tractor Corporation ("Kubota"), collected the full value of the tractors—$479,500—from its insurer, Sompo Japan Insurance Co. of America ("Sompo"). Subrogating Kubota's claim, Sompo then brought this suit against defendant-appellee Union Pacific Railroad Co. ("Union Pacific" or

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[1] The Honorable David G. Trager, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

"the Railroad") in the Southern District of New York. The district court (Duffy, J.) granted partial summary judgment in favor of Union Pacific, giving effect to the contract for carriage, which incorporates by reference the Carriage of Goods by Sea Act ("COGSA"), Pub.L. 16 No. 74-521, 49 Stat. 1207 (1936) (codified at 46 U.S.C. app. §§ 1301-1315), and effectively limits Union Pacific's liability to $500 per tractor, or $16,000. *See Sompo Japan Ins. of Am. v. Union Pac. R.R. Co.*, No. 03-1604, 2003 WL 22510361, at *4 (S.D.N.Y. Nov.5, 2003).[2]

On appeal, Sompo argues that the district court erred in finding that another statute, the Carmack Amendment to the Interstate Commerce Act of 1887 ("Carmack"), Act of June 29, 1906, ch. 3591, 34 Stat. 584 (1906) (current version at 49 U.S.C. § 11706), does not govern the Railroad's liability in this case. We agree and accordingly vacate the district court's order for partial summary judgment and remand this case for further proceedings.

Background

In July 2002, Kubota hired Mitsui OSK Line Ltd. ("MOL"), an ocean shipping company, to ship thirty-two tractors from Tokyo, Japan to Swanee, Georgia. As evidence of this agreement, MOL issued three identical bills of lading, contracts that "record[ ] that a carrier has received goods from the party that wishes to ship them, state[ ] the terms of carriage, and serve[ ]

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[2] After the district court denied Sompo's motion for reconsideration, the parties stipulated to a final judgment subject to Sompo's right to appeal. *See Sompo Japan Ins. of Am. v. Union Pac. R.R. Co.*, No. 03-1604, 2003 WL 22510361 (S.D.N.Y. Nov. 05, 2003); *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, No. 03-1604 (S.D.N.Y. June 23, 2004).

as evidence of the contract for carriage." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). The bills of lading were "through" bills: they covered the entire journey from start to finish, including both the ocean and land legs. *See id.* at 25-26, 125 S.Ct. 385. Further, they were "intermodal" through bills, meaning that they contemplated multiple modes of transportation, including ocean and rail carriage. Pursuant to the bills of lading, MOL shipped the tractors by ocean transit from Tokyo to Los Angeles, California where the cargo was then transferred from MOL's ship to MOL's subcontractor, Union Pacific,[3] for rail carriage to Georgia. Union Pacific issued electronic waybills[4] covering the rail carriage to Georgia. While Union Pacific was transporting the cargo, the tractors were damaged in a train derailment in Texas.

In the district court, Union Pacific argued that, pursuant to the MOL bills of lading, its liability should be limited to $500 per package. In particular, Union Pacific relied upon two provisions in the bills, Clause 29 and Clause 4. Clause 29 is a "clause paramount," which identifies the law that will govern the rights and liabilities of all parties to the bill of lading. Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading*

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[3] There is some confusion as to how exactly the rail shipment was subcontracted to Union Pacific. *See Sompo*, 2003 WL 22510361, at *1 n. 2. How the subcontract was entered is of no moment to the resolution of this appeal.

[4] Like bills of lading, waybills are contracts for the carriage of goods. 1 T. SCHOENBAUM, ADMIRALTY LAW § 10-11 (4th ed.2006). But in contrast to bills of lading, waybills are nonnegotiable. *Id.*

Issues, 46 Am. J. Comp. L. 403, 408 n. 37 (1998). The clause paramount in the MOL bills recognizes COGSA as the governing law for the ocean leg of the journey and further includes a "period of responsibility clause," *see id.* at 408 n. 36, a contractual provision extending COGSA's reach beyond "the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. § 1301(e). The period of responsibility clause in the MOL bills of lading provides that "[MOL] shall be entitled to the benefits of the defences [sic] and limitations in the U.S. COGSA, whether the loss or damage to the Goods occurs at sea or not." *Sompo*, 2003 WL 22510361, at *2 (quoting MOL bills of lading) (second alteration in *Sompo;* emphasis removed).

Clause 4 of the MOL bills of lading constitutes what is referred to as a "himalaya clause,"[5] a contractual provision "extend[ing] to third parties the defenses, immunities, limitations or other protections a law or a bill of lading confers on a carrier." Wood, *supra,* at 408 n. 35. The himalaya clause in the MOL bills expressly authorizes MOL to subcontract the carriage of Kubota's tractors and grants all subcontractors "the benefit of all provisions herein benefiting the Carrier [MOL] as if such provisions were expressly for their benefit." *Sompo*, 2003 WL 22510361, at *2 (quoting MOL bills of lading) (emphasis removed). Combining the Clause 29 period of responsibility clause with the Clause 4 himalaya clause, Union Pacific argued that its liability as a subcontractor was limited to $500 per

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[5] The clause derives its name "from the steamship 'Himalaya' which was involved in *Adler v. Dixon*, [1955] 1 Q.B. 158 (C.A.1954)." *Toshiba Int'l Corp. v. M/V "Sea-Land Express"*, 841 F.Supp. 123, 125 n. 4 (S.D.N.Y.1994) (alteration in original).

tractor.

The district court agreed with Union Pacific. It rejected Sompo's contention that two other federal statutes—Carmack and the Staggers Rail Act of 1980 ("Staggers"), Pub.L. No. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. § 11706)—governed the liability of Union Pacific in this case. Sompo argues on appeal, as it argued below, that Carmack and Staggers together take precedence over the COGSA liability limitation that the MOL bills of lading extend to Union Pacific. Although the district court recognized that Carmack and Staggers apply in certain circumstances to impose full liability upon a rail carrier for any losses caused by the railroad, it nevertheless ruled that, because MOL employed through bills of lading containing period of responsibility and himalaya clauses, the Carmack/Staggers statutory regime was inapplicable to this case. *Sompo*, 2003 WL 22510361, at *4. We disagree. Carmack applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country, like the one at issue here. While the through bills attempt to extend COGSA's sweep inland, that contractual extension lacks the force of statute. And in our view, the intermodal through bills, written in the context of COGSA, falls short of the Staggers prerequisite for limiting a rail carrier's Carmack liability. Carmack controls; a remand is required.

Discussion

I. The Statutory Landscape

The issues presented in this case arise out of the confluence of two fairly complex federal statutory schemes that govern different aspects of international commerce.

A. COGSA

COGSA "was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924." *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959). The purpose of the Hague Rules was to establish "international uniformity in the law governing the carriage of goods by sea." Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods By Sea*, 26 J. Mar. L. & Com. 553, 556 (1995) (hereinafter "Uniformity in the Law"). "COGSA is the culmination of a multilateral effort 'to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade....' " *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (quoting *Robert C. Herd & Co.*, 359 U.S. at 301, 79 S.Ct. 766).

COGSA establishes a negligence-based liability regime.[6] The statute also explicitly permits a carrier to limit its liability for loss or damage to the cargo it is carrying to $500 per "package." 46 U.S.C. app. § 1304(5).[7] A carrier cannot avail itself of the COGSA

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[6] Under COGSA, a carrier may avoid liability on a number of grounds, including "due diligence" with respect to damage caused by unseaworthiness. *See* 46 U.S.C. app. § 1304(1). With respect to damage caused by something other than unseaworthiness, the carrier can avoid liability by proving among other things that he was without actual fault and privity and that his agents or servants were without fault or neglect. *See id.* § 1304(2)(q).

[7] The statute itself does not define the term "package," which is a term that is largely fact-dependent. *See* 2A-XVI BENEDICT ON ADMIRALTY § 167 (7th ed.1998). In any case, the definition of "package" is not at issue in this case.

$500-per-package liability limitation unless the shipper is given a "fair opportunity" to declare a higher liability value for its cargo. *Gen. Elec. Co. v. MV Nedlloyd*, 817 F.2d 1022, 1028 (2d Cir.1987). Thus, as long as the shipper is given a fair opportunity to declare a value higher than $500 per package—the higher value need not be the full value of the goods—the carrier's maximum liability is limited to whatever value the shipper declares. If the shipper declares no value, the carrier's liability is defaulted to $500 per package. But if the carrier fails to give the shipper a fair opportunity to declare a value, then the carrier is liable for the full value of the cargo.

By its terms, COGSA only applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship," 46 U.S.C. app. § 1301(e), the so-called "tackle-to-tackle" period. But the statute also contemplates that parties will enter into agreements extending COGSA's terms beyond the tackle-to-tackle period:

> Nothing contained in [COGSA] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

46 U.S.C. app. § 1307. Thus, COGSA does not prevent a carrier in its bill of lading from choosing "to extend the [COGSA] default rule to the entire period in which the [cargo] would be under its responsibility, including the period of the inland transport." *Kirby*, 543 U.S. at

29, 125 S.Ct. 385.

B. The Carmack Amendment and the Staggers Rail Act of 1980

In 1887, Congress passed the Interstate Commerce Act ("ICA") and created the Interstate Commerce Commission ("ICC"). The ICA empowered the ICC to regulate railroad rates, a responsibility that in 1995 Congress transferred to the Surface Transportation Board ("Board"). *See* Interstate Commerce Commission Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (codified generally at Title 49). Congress added Carmack to the ICA in 1906, *see* Act of June 29, 1906, ch. 3591, 34 Stat. 584 (1906), in an effort "to create a national scheme of carrier liability for goods damaged or lost during interstate shipment under a valid bill of lading." *Ting-Hwa Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 704 (4th Cir.1993). Carmack applies to carriage by railroad or "by railroad and water" if the carriage is "under common control, management, or arrangement for a continuous carriage or shipment," including "transportation in the United States between a place in ... the United States and a place in a foreign country." 49 U.S.C. § 10501(a). In enacting Carmack, Congress also intended "to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." *Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950). Thus, Carmack allows a shipper to recover for damage or loss from either the delivering carrier or the carrier issuing the bill of lading or receipt.

Whereas COGSA establishes a negligence-like liability regime, Carmack "imposes something close to

strict liability upon originating and delivering carriers." *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 9 (1st Cir.2003). Indeed, Carmack effectively codified the strict liability rule that governed the liability of common carriers at common law. *See Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964). Once the shipper establishes a prima facie case of Carmack liability by showing "delivery in good condition, arrival in damaged condition, and the amount of damages," *id.* at 138, 84 S.Ct. 1142; *see also* 49 U.S.C. § 14706(a)(1), the carrier is liable "for the actual loss or injury to the property" it transports, 49 U.S.C. § 14706(a)(1), unless there is an available defense.[8]

By 1976, the extensive regulatory scheme created by the ICA had prevented rail carriers from effectively competing with other modes of transportation. *See Tokio Marine & Fire Ins., Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir.1993); *W. Coal Traffic League v. United States*, 694 F.2d 378, 384 (5th Cir.1982). As part of an expansive deregulation effort, Congress enacted the Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. § 11706), which, among other things, authorized the ICC "to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement." 49

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[8] The Supreme Court has indicated that Carmack preserved the defenses available to common carriers at common law. *See Missouri Pac. R.R.*, 377 U.S. at 137-38, 84 S.Ct. 1142. Thus, even under Carmack, a carrier is relieved of liability if it can prove (1) that it was free from negligence, and (2) that the damage to the cargo was caused by one of five excusable factors: (a) an act of God, (b) the public enemy, (c) an act of the shipper himself, (d) public authority, or (e) the inherent vice or nature of the goods. *Id.*

U.S.C. § 10502(f). Pursuant to this authority, the ICC exempted from regulation rail carriers, like Union Pacific, that operate one leg of a continuous intermodal movement. *See* 49 C.F.R. § 1090.2.

While this exempt order relieved certain rail carriers of rate regulation, it did not free them from all legal obligations to shippers. In particular, exempt rail carriers must satisfy the requirements of 49 U.S.C. § 10502(e), which states:

> No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

Section 11706 is the Carmack provision governing the liability of rail carriers. It provides, among other things, that the "rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property." 49 U.S.C. § 11706(a). Thus, exempt rail carriers, including those operating under an intermodal bill may limit their liability under Carmack by negotiating "alternative terms." However, the combined effect of § 10502(e) and § 11706(a) is that rail carriers that wish to limit their liability must offer the shipper the option of full Carmack coverage, which

includes both the Carmack version of strict liability and full coverage for loss. *See Tokio Marine*, 996 F.2d at 879 ("rail carriers still must offer full rates"); *Am. Trucking Ass'ns, Inc. v. ICC*, 656 F.2d 1115, 1124 (5th Cir.1981) ("the exemption does not and could not relieve rail carriers from the provisions of [§ 11706[9]]"); *Co-operative Shippers, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 613 F.Supp. 788, 791 (N.D.Ill.1985) ("[a]lthough freed from most regulation, [exempt rail carriers] are still subject to the liability provisions of [§ 11706]"), *overruled on other grounds*, 840 F.2d 447 (7th Cir.1988); *cf. Yamazen U.S.A., Inc. v. Chicago & Nw. Transp. Co.*, 790 F.2d 621, 622 (7th Cir.1986) (finding that § 11502(e), coupled with 11706(e), which states that a rail carrier or freight provider "may not provide by rule, contract, or otherwise ... a period of less than 2 years for bringing a civil action against it under this section," requires the carrier to offer the shipper a two-year filing period before offering alternative terms); *Ferrostaal, Inc. v. Union Pac. R.R. Co.*, 109 F.Supp.2d 146, 149-50 (S.D.N.Y.2000) (same). If an exempt rail carrier fails to offer the shipper the option of coverage for the actual loss or injury to the property, then the shipper may sue the carrier under Carmack. *See, e.g., Tokio Marine*, 996 F.2d at 880.

As noted above, MOL's through bills of lading gave Kubota a "fair opportunity" to declare a value for the tractors in excess of $500 per package, and Kubota declined. Thus, MOL did all that was required under COGSA to trigger the statute's $500-per-package liability limitation. But Sompo argues forcefully on

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[9] At the time these cases were decided, 49 U.S.C. § 11706 was codified at 49 U.S.C. § 11707.

appeal that Carmack and Staggers apply to the domestic rail portion of a shipment that, like Kubota's, originates in a foreign country and travels under a through bill of lading. We therefore must decide whether Carmack applies to the inland portion of Kubota's shipment, a carriage of goods by rail shipped under a through bill of lading from a foreign country to a destination in the United States. If it does not, then the joint force of the period of responsibility and himalaya clauses will limit Union Pacific's liability to $500 per package. If, however, Carmack does apply, we must resolve a potential conflict between Carmack's possible imposition of full liability upon Union Pacific and COGSA's liability limitation incorporated by reference in MOL's bill of lading and extended to Union Pacific by virtue of the himalaya clause. If Carmack takes precedence over a contractual extension of COGSA, then we must address whether Union Pacific has complied with the requirements of Staggers so as to be permitted to limit its liability under Carmack. *See* 49 U.S.C. § 11706(c)(1), (c)(3)(A).

II. Carmack's Applicability

Carmack applies to common carriers "providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board." 49 U.S.C. § 11706(a). The Board's jurisdiction over rail carriers applies to "transportation in the United States between a place in ... the United States and a place in a foreign country." 49 U.S.C. § 10501(a)(2)(A) & (F).

Sompo argues that "if the domestic rail transport is part of a larger transportation originating in a foreign country, then it fits the statutory requirement that it is a shipment between a place in the United States and a foreign country, and Carmack is applicable to it." Not

surprisingly, Union Pacific sees things differently: "[t]he Carmack Amendment is generally inapplicable where a through bill of lading contemplated inland transportation of goods." The parties' arguments reflect a difference of opinion in the courts regarding Carmack's applicability to a through bill of lading covering a shipment of goods originating in a foreign country. *Compare, e.g., Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir.2000); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 698-700 (11th Cir.1986); *Berlanga v. Terrier Transp., Inc.*, 269 F.Supp.2d 821, 829-30 (N.D.Tex.2003); *Canon USA, Inc. v. Nippon Liner Sys., Ltd.*, No. 90-C-7350, 1992 WL 82509, at *6-8 (N.D.Ill.1992), *with Shao*, 986 F.2d at 701-04; *Capitol Converting Equipment, Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir.1992); *Toshiba Int'l Corp. v. M/V "Sea-Land Express,"* 841 F.Supp. 123, 128 (S.D.N.Y.1994). Surprisingly, this is an issue of first impression in this Circuit.

Most courts that have answered this question tend to reiterate the Eleventh Circuit's articulation of its holding in *Swift Textiles v. Watkins Lines, Inc.* that "when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge," *Swift*, 799 F.2d at 701, as is the case with a through bill of lading, then Carmack applies *only* if there is a separate bill of lading covering the inland portion of the shipment. *See, e.g., Shao*, 986 F.2d at 703; *Capitol Converting*, 965 F.2d at 394; *Toshiba*, 841 F.Supp. at 128. We agree with *Swift's* mode of analysis but think that the court's articulated holding is fatally flawed.

Swift involved a shipment of textile machinery from

Switzerland to LaGrange, Georgia. There was no through bill of lading. Rather, the machinery was shipped from Switzerland to Savannah, Georgia under one bill of lading and then trucked by a motor carrier from Savannah to LaGrange under a separate bill of lading. *Swift*, 799 F.2d at 698. During the Savannah-to-LaGrange leg of the journey, one of the containers housing the machinery slid off the truck, and the contents of the container was damaged. *See id.* In 1986, when the case came before the Eleventh Circuit, the ICC's jurisdiction over the shipment in question was governed by a provision that was nearly identical to that applying to rail carriers. *Compare* 49 U.S.C. § 10521(a)(1)(E) (repealed in 1995), *with* 49 U.S.C. § 10501(a)(2)(F). The provision stated that the ICC exercised jurisdiction over transportation of motor carriers "between a place in ... the United States and a place in a foreign country to the extent the transportation is in the United States." 49 U.S.C. § 10521(a)(1)(E) (repealed in 1995). The ICC had no jurisdiction, however, over a purely intrastate journey.[10]

For the court in *Swift*, there was no question that Carmack applied to the domestic leg of a shipment that began in a foreign country. Indeed, the court referred in the opinion to § 10521(a)(1)(E) as "the continuation of foreign commerce provision." *Swift*, 799 F.2d at 699.

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[10] The statute gave the ICC jurisdiction over transportation by motor carrier between "a State and a place in another State" and between "a State and another place in the same State through another State." Act to Revise the Interstate Commerce Act, Pub.L. 95-473, 92 Stat. 1337, § 10521(a)(1)(B), 1361-62 (1978). But because the entire domestic leg of the journey took place solely within one state, these provisions did not apply.

Thus, the court understood that if the shipment of goods from Switzerland to LaGrange, Georgia, was one continuous foreign shipment, then Carmack applied. However, if there were two separate shipments—one from Switzerland to Savannah and another from Savannah to LaGrange—then Carmack did not apply to the inland portion of the trip. The motor carrier urged the court to view the separate domestic bill of lading covering the inland carriage as evidence of two separate, distinct shipments. The court rejected this argument and articulated an "intent test" for determining the nature of an intermodal shipment: "[t]he nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by 'the essential character of the commerce,' *United States v. Erie R.R. Co.*, 280 U.S. 98, 102, 50 S.Ct. 51, 74 L.Ed. 187 (1929), reflected by the 'intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement,' *Great N. Ry. Co. v. Thompson*, 222 F.Supp. 573, 582 (D.N.D.1963) (three-judge district court)." *Swift*, 799 F.2d at 699.

Applying this intent test, the court determined that the shipment represented a "continuation of foreign commerce" and therefore Carmack applied. "There was no reason for the container to come to rest in Savannah other than for the consignee's customs broker to make arrangements for the Savannah to LaGrange leg of the journey." *Id.* at 700. It was obvious the parties "intended [the shipment] to begin in Switzerland and end in LaGrange, Georgia." *Id.* Having adopted a view of the shipment as a single continuous transport, the court considered it irrelevant

that the motor carrier had issued a separate bill of lading for the final intrastate leg of the journey. Quoting the Supreme Court in *Erie Railroad*, the *Swift* court explained that the character of the shipment is "not affected by the fact that the transaction is ... completed under a local bill of lading which is wholly intrastate...." *Id.* at 700 (quoting *Erie R.R.*, 280 U.S. at 102, 50 S.Ct. 51).

Despite the clarity of *Swift's* analysis, the court muddied the waters when it articulated its holding:

> [W]hen a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment *as long as the domestic leg is covered by separate bill or bills of lading.*

Id. at 701 (emphasis added). The court's statement that a domestic bill of lading is *necessary* for Carmack to apply is perplexing to say the least. Indeed, it was the separate domestic bill of lading (covering a purely intrastate journey) in *Swift* that the motor carrier employed, unsuccessfully, to argue that Carmack *did not* apply. Once the *Swift* court had determined that the parties intended a continuous shipment from the foreign place of origin to the final destination, it deemed the separate domestic bill of lading to be irrelevant. Further, the version of Carmack in force at the time of *Swift* explicitly provided that a motor (or rail) carrier's failure to issue a bill of lading did not remove the carrier from Carmack's reach, *see* 92 Stat. at 1359, 1361, 1453, and that provision still exists as to rail carriers, *see* 49 U.S.C. § 11706(a).

The disconnect between *Swift's* reasoning and the articulation of its holding has not gone unnoticed. *See, e.g., Berlanga*, 269 F.Supp.2d at 829. In fact, recognizing the inconsistency, one court has hypothesized that *Swift's* use of the phrase "as long as" instead of "even if" was due to a typographical error. *See Canon USA*, 1992 WL 82509, at *7. We are therefore reluctant to rely on any line of precedent derived from *Swift's* articulated holding.[11]

Nevertheless, although we reject *Swift's* articulated

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[11] For an illustration of the confusion caused by *Swift's* articulated holding, one need look no further than the Seventh Circuit's opinion in *Capitol Converting*, 965 F.2d at 391. In an attempt to rationalize *Swift's* articulated holding, the court in *Capitol Converting* explained that Carmack only applies to a shipment of goods originating in a foreign country if there is a "separate domestic segment," as evidenced by a separate domestic bill of lading. *Id.* at 394. But this surely cannot be the rationale underlying *Swift's* articulated holding because the *Swift* court clearly viewed the domestic transport at issue in that case as part of a single continuous shipment rather than as a separate domestic shipment. *See Swift*, 799 F.2d at 700 ("[I]t cannot be disputed that the shipment was intended to begin in Switzerland and end in LaGrange, Georgia."). Further, the *Swift* court explicitly stated that Carmack applies to such a "continuation of foreign commerce." *Id.* Moreover, had the *Swift* court viewed the domestic shipment in that case as separate and distinct from the rest of the transport, as *Capitol Converting* suggests, it would clearly have held that Carmack *did not apply* because, unlike the domestic *interstate* shipment in *Capitol Converting*, the domestic shipment in *Swift* was an *intrastate* shipment to which Carmack clearly does not apply. *Id.* at 699. Thus, *Capitol Converting's* rationalization of *Swift* is wholly unpersuasive. Regrettably, it has proven to be influential. *See, e.g., Tokio Marine & Fire Ins. Co. v. Kaisha*, 25 F.Supp.2d 1071, 1081 (C.D.Cal.1997); *N.Y. Marine & Gen. Ins. Co. v. S/S "Ming Prosperity"*, 920 F.Supp. 416, 425 (S.D.N.Y.1996); *Toshiba*, 841 F.Supp. at 128.

holding, we have no hesitation about adopting *Swift's* mode of analysis for determining Carmack's applicability, and in fact we have done so before. *See Project Hope v. M/V IBN SINA*, 250 F.3d 67, 74-75 (2d Cir.2001). Under that analysis, we must first determine the nature of the shipment in question—whether it is a single continuous intermodal shipment or multiple shipments consisting of separate ocean and domestic legs. Then we must determine whether Carmack applies to the shipment at issue.

The answer to the first question is straightforward. Under the *Swift* intent test, which we applied in *Project Hope*, the domestic leg of the Kubota shipment is a continuation of foreign commerce rather than a separate and distinct interstate transport of goods. Kubota's intention that the tractors travel from Japan to Swanee, Georgia was fixed at the time the shipment began in Japan, as evidenced by the through bill of lading designating Swanee, Georgia as the final destination. The fact that Union Pacific issued separate domestic waybills does not change the nature of the shipment. *Cf. Project Hope*, 250 F.3d at 75 (collecting cases supporting the proposition that the foreign commerce nature of a shipment is not affected by the issuance of a domestic bill of lading covering intrastate transport).

While it is relatively clear that Kubota's shipment of tractors is a single continuous shipment of goods originating in a foreign country and destined for the United States, whether Carmack applies to the domestic rail portion of such a shipment is a more complicated question. To be clear, the source of the complexity is not the requirement of *Swift's* articulated holding that Carmack applies to such a shipment only if

there is also a separate domestic bill of lading. As we have already explained, that requirement is nonsensical in light of *Swift's* own analysis, as well as the statute, and was likely the result of an inadvertent error. Rather, the complexity derives from the language and history of the statute itself.

"The starting point for [the] interpretation of a statute is always its language," *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). As pertinent to this case, Carmack applies to "transportation in the United States between a place in ... the United States and a place in a foreign country." 49 U.S.C. § 10501(a)(2)(F). At first blush, the word "between" does not seem to imply a direction of travel; rather, it appears to describe simply the relationship that an object or activity bears with respect to two fixed points. Thus, the phrase "air service between the two cities" means that the air service is from one city to the other and vice versa. WEBSTER'S THIRD NEW INT'L DICTIONARY 209 (2002). Then again, the phrase "two cities" does not give priority to either of the two endpoints. Both rest on equal footing. By contrast, by providing that the Board has jurisdiction over "transportation ... between ... the United States and ... a foreign country," 49 U.S.C. § 10501(a)(2)(F), without also granting jurisdiction over transportation between a foreign country and the United States, the ICA might be read as distinguishing between exports and imports.

In a thoughtful analysis of Carmack's applicability, a Texas district court relied in part upon a comparison of prior versions of the statute to find that Carmack applies to the domestic portion of international shipments *regardless* of the direction of travel. *Berlanga*, 269 F.Supp.2d at 826-27. Prior to 1978, the statute did not include the word "between" and instead covered the transportation of property "*from* any point in the United States *to* a point in an adjacent country." *F.J. McCarty Co. v. S. Pac. Co.*, 428 F.2d 690, 692 n. 1 (9th Cir.1970) (quoting 49 U.S.C. § 20(11)) (emphasis added). In 1978, Congress amended the Interstate Commerce Act, replacing the "from ... to" construction with the word "between." Amendments to the Interstate Commerce Act, Pub.L. No. 95-473, § 10501(a)(2)(G), 92 Stat. 1337, 1359 (1978). Employing the canon of statutory construction "requiring a change in language to be read, if possible, to have some effect," *Am. Nat'l Red Cross v. S. G.*, 505 U.S. 247, 263, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992), the court in *Berlanga* concluded that Congress, by changing this language in 1978, must have intended for Carmack's applicability to the carriage of goods traveling in foreign commerce to no longer depend upon the shipment's point of origin. 269 F.Supp.2d at 826-27.

However, the court in *Berlanga*, as well as subsequent courts, failed to notice that the 1978 amendments were adopted in a codification bill enacting the ICA into positive law, and it is well-established that courts should not "infer[ ] that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227, 77 S.Ct. 787, 1 L.Ed.2d

786 (1957). Congress expressed no such intention in the 1978 amendments. To the contrary, Congress made clear that the bill was intended to leave the law substantively unchanged. *See* H.R.Rep. No. 1395, 95th Cong., 2d Sess. 9 (1978), *reprinted in* U.S.Code Cong. & Ad. News 3009, 3018 (cited in *In re Roll Form Prods., Inc.*, 662 F.2d 150, 153 & n. 5 (2d Cir.1981)).[12]

Nevertheless, judicial interpretations of this earlier version of the ICA, combined with well-settled principles of statutory construction, lead us to conclude that even the pre-1978 statute, which contained the "from ... to" language, provided that Carmack applied to the transportation of goods both exiting and entering the United States. When Carmack was first enacted, it did not apply to shipments of goods destined for foreign countries but was instead limited to purely interstate commerce. *See* Act of June 29, 1906, c. 3591, 34 Stat. 593 (originally codified at 49 U.S.C. § 20(11)); *see also J.H. Hamlen & Sons Co. v. Ill. Cent. R. Co.*, 212 F. 324, 327 (E.D.Ark.1914). By contrast, the ICC's regulatory jurisdiction originally included

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[12] In particular, Congress stated the following:

> Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

H.R.Rep. No. 1395, 95th Cong., 2d Sess. 9 (1978), *reprinted in* U.S.Code Cong. & Ad. News 3009, 3018.

transportation "from any place in the United States to an adjacent foreign country." Act to Regulate Commerce, Feb. 4, 1887, c. 104, 24 Stat. 379 (originally codified at 49 U.S.C. § 1). Thus, as of 1906, the ICA provision establishing the ICC's jurisdiction covered a wider swathe of common carrier transportation than under Carmack, the ICA provision establishing a common carrier's liability.

Congress eliminated that distinction in 1915 when it enacted the First Cummins Amendment, which extended Carmack's application to transportation "from any point in the United States to a point in an adjacent foreign country." Act of March 4, 1915, c. 176, 38 Stat. 1196, 1197. While the First Cummins Amendment brought certain foreign shipments within Carmack's reach, there remained a question as to the precise boundaries of the "from ... to" language.

In *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury*, 254 U.S. 357, 359-60, 41 S.Ct. 114, 65 L.Ed. 301 (1920), the Supreme Court interpreted the "from ... to" language contained in the ICA's jurisdictional provision as encompassing both exports and imports. At issue in *Woodbury* was whether a railroad could avail itself of a tariff published with the ICC to limit its liability for a passenger's trunk that was lost in transit from Canada to Texas. The Court explained that even under Carmack, carriers could limit their liability by publishing a tariff with the ICC and that this rule survived the First Cummins Amendment. *Id.* at 359, 41 S.Ct. 114. The rail passenger argued that, in order to take advantage of the tariff published with the ICC, the transportation in question had to be one over which the ICC could assert its jurisdiction. *Id.* Because the transportation in question originated in Canada rather

than in the United States, the rail passenger argued, the transportation was not "from any place in the United States to an adjacent foreign country," and therefore the ICC lacked jurisdiction. *Id.* The Supreme Court rejected this argument and, in what was later described euphemistically as a "prodigious feat of interpretation," Note, *Foreign Commerce and the Interstate Commerce Act*, 40 Harv. L.Rev. 1130, 1134 (1927), read the "from ... to" language as conferring upon the ICC jurisdiction over transportation in foreign commerce *regardless* of whether the transportation originated in the United States or in an adjacent foreign country, *Woodbury*, 254 U.S. at 359, 41 S.Ct. 114. Writing for the Court, Justice Brandeis reasoned that "[a] carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States." *Id.* Justice Brandeis found support for this bi-directional reading of the language in both ICC interpretations and Supreme Court cases interpreting similar language in analogous trade contexts. *See id.* at 360, 41 S.Ct. 114.

The use of similar language, let alone identical language, in two different provisions of the same statute is, as the Supreme Court has emphasized, "a strong indication that [the two provisions] should be interpreted *pari passu*," *i.e.*, in the same manner. *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (per curiam). This principle of statutory construction holds true unless "there is strong evidence that Congress did not intend the language to be used uniformly." *Smith v. City of Jackson*, 544 U.S. 228, 261, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (O'Connor, J., concurring in the

judgment); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006). Thus, while the *Woodbury* Court interpreted the "from ... to" language only in that section of the ICA defining the ICC's jurisdiction, one would think that the same interpretation would have applied to the identical language in Carmack. In general, however, lower courts have resisted that inclination, *see, e.g., Sklaroff v. Pennsylvania R.R. Co.*, 184 F.2d 575, 575 (3rd Cir.1950); *Strachman v. Palmer*, 177 F.2d 427, 429 (1st Cir.1949); *Condakes v. Smith*, 281 F.Supp. 1014, 1015 (D.Mass.1968), and have tended instead to adopt the reasoning of an influential Pennsylvania Superior Court decision, *Alwine v. Pennsylvania R. Co.*, 141 Pa.Super. 558, 15 A.2d 507 (1940).

The *Alwine* court provided two rationales for its decision not to extend the *Woodbury* interpretation of the "from ... to" language of the Carmack liability provision and instead to limit that interpretation to the language in the ICC jurisdiction provision. First, the *Alwine* court noted that the ICC itself had interpreted the First Cummins Amendment as "extend[ing] the territorial application of the provisions of the Carmack amendment to ... goods *exported* to adjacent foreign countries." *Id.* at 510 (quoting 52 I.C.C. 671, 683 (Apr. 14, 1919)). However, it is not clear that this quote represented the ICC's official interpretation of the ICA. And even if it was an official interpretation, the ICC did not state, and to our knowledge has never stated, that Carmack applied *exclusively* to exports.

Second, the court in *Alwine* also relied upon an inference drawn from congressional action following the *Woodbury* decision. *Id.* It explained that in

Woodbury, after the state court's decision, which viewed the ICC jurisdiction provision as covering only exports, Congress set into motion an amendment to the ICA to make clear that the ICC had jurisdiction over the carriage of goods exported to, or imported from, an adjacent foreign country. *Id.* That amendment was finally enacted two months after the Supreme Court issued its decision in *Woodbury*. *See* Act of February 28, 1920, c. 91, 41 Stat. 456, 474. The court in *Alwine* reasoned that Congress's failure, in the course of altering the language in the jurisdiction provision, to change the parallel language in Carmack, while at the same time making other minor revisions in Carmack, *see id.* 41 Stat. at 494, supported an inference that Congress no longer intended the two provisions to be co-extensive. *Alwine*, 15 A.2d at 510.

We are less sanguine than the *Alwine* court about the force of that inference. The Supreme Court has on numerous occasions expressed a "reluctan [ce] to draw inferences from Congress' failure to act." *Brecht v. Abrahamson*, 507 U.S. 619, 632-33, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) (citing *Am. Trucking Ass'ns., Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416-18, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967))). That reluctance seems to be particularly apt in a case like *Alwine*, where the inference drawn would deny the effect of a Supreme Court precedent. Indeed, if anything, Congress's re-enactment of Carmack in the Act of February 28, 1920 without changing the "from ... to" language would seem to reflect a congressional intent to ratify the Supreme Court's interpretation of that language in *Woodbury*. *Cf. Merrill Lynch, Pierce,*

Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n. 66, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change ...." (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978))). We do not think that Congress, by simply making the language of the ICC jurisdiction provision more explicit in light of the *Woodbury* Court's interpretation of that language, indicated any intent to restrict Carmack's coverage solely to exports.

Nor do we think that the Supreme Court's later decision in *Reider v. Thompson*, 339 U.S. 113, 70 S.Ct. 499, 94 L.Ed. 698 (1950), resolved the issue at hand, as the Seventh Circuit has suggested. *See Capitol Converting*, 965 F.2d at 394 (characterizing *Reider* as holding that Carmack does not cover goods shipped under a through bill of lading issued in a foreign country). The issue in *Reider* was whether Carmack applied to the inland rail carriage of a shipment of goods that originated in Buenos Aires, Argentina with the final destination of Boston, by way of New Orleans, Louisiana. Importantly, the original carrier in *Reider* did not issue a through bill of lading from Buenos Aires to Boston. 339 U.S. at 117, 70 S.Ct. 499. Accordingly, the Supreme Court viewed the shipment as consisting of two distinct legs: Buenos Aires to New Orleans and New Orleans to Boston, and the Court rightly pointed out that Carmack clearly applies to the interstate leg from New Orleans to Boston. *Id.* The Court then proceeded to clarify that, because the shipment involved no through bill of lading, it would not decide whether *Alwine* was correctly decided. *See id.* at 118,

70 S.Ct. 499 ("We need not now determine whether *[Alwine]* was correctly decided. For purposes of this case it is sufficient to note that there the Pennsylvania court emphasized that the shipment came into this country on a through bill of lading from Canada. The contract of carriage did not terminate at the border, as in the instant case."). Thus, notwithstanding the Seventh Circuit's suggestion to the contrary in *Capitol Converting*, the *Reider* Court specifically reserved from its judgment the question at issue here: whether Carmack applies to the domestic rail portion of a single, continuous shipment of goods originating in a foreign country.

Where does that leave us? We know that *Woodbury* interpreted the phrase "from a place in the United States to a place in an adjacent foreign country" in the ICC jurisdiction provision as encompassing both imports and exports. As we have noted, that interpretation should also govern the "from ... to" language in Carmack in the absence of "strong evidence" that Congress wished for the language in the ICC jurisdiction provision to be interpreted differently from that of Carmack. *See Smith*, 544 U.S. at 261, 125 S.Ct. 1536 (O'Connor, J., concurring). Because we have found no evidence, let alone "strong evidence," of such congressional intent, we conclude that the Supreme Court's decision in *Woodbury* would have governed the interpretation of the "from ... to" language in Carmack prior to 1978, the year that Congress enacted the ICA into positive law. Accordingly, we find that at that time, Carmack applied to the domestic portion of a transportation of goods originating outside of the

United States.[13] Although we might question the basis for the *Woodbury* Court's interpretation, we cannot simply jettison a Supreme Court case because we disagree with it. "Even if a Supreme Court precedent was 'unsound when decided' ... it remains the Supreme Court's 'prerogative alone to overrule one of its precedents.'" *Bach v. Pataki*, 408 F.3d 75, 86 (2d Cir.2005) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 9, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir.1996) (Posner, J.))). *Woodbury* has never been overruled and therefore is still good law that we are obligated to follow.

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[13] One could fairly raise the objection that, regardless of the proper interpretation of the "from ... to" language in the pre-codification version of Carmack, the pre-codification version of the statute contained language making clear that Carmack only applied to international shipments of goods involving "an *adjacent* foreign country," *Berlanga*, 269 F.Supp.2d at 827 (quoting 49 U.S.C. § 20(11) (1976) (emphasis added)), and that the codification bill's omission of the word "adjacent" should not be interpreted as a change in the law. Under this objection, it would follow that Carmack does not apply in this case because the Kubota shipment involved transportation from a non-adjacent country, Japan, to Georgia. This objection, however, is foreclosed by our decision in *Project Hope*. Focusing solely on the post-codification language, we held in *Project Hope* that Carmack applied to the domestic motor carriage portion of an international shipment originating in Virginia and destined for a non-adjacent country, Egypt. *See Project Hope*, 250 F.3d at 75. Although *Project Hope* involved motor, rather than rail, carriage, the post-codification language governing the Board's jurisdiction, and therefore Carmack's applicability, is identical regardless of the mode of transport. *Compare* 49 U.S.C. § 13501(1)(E) with 49 U.S.C. § 10501(2)(F). Thus, we find ourselves bound by Project Hope's holding, which effectively extended Carmack's applicability to international shipments involving non-adjacent foreign countries.

Our interpretation of Carmack—that it applies to the domestic inland portion of a foreign shipment regardless of the shipment's point of origin—also comports with Congress's view of the law when Congress codified the ICA in 1978. In the codification bill, Congress struck the "from ... to" language from Carmack altogether and made Carmack's applicability turn on whether a "common carrier [is] providing transportation subject to the Interstate Commerce Commission." 49 U.S.C. § 11706, 92 Stat. at 1453. Thus, Congress indicated that, in order to determine Carmack's applicability, one must consult the ICC jurisdiction provision. Because the codification bill was intended to leave the substantive law unchanged, this structural re-arrangement of Carmack reflects Congress's understanding that the boundaries of Carmack's applicability have always been co-extensive with those of the ICC's jurisdiction. *Woodbury* and the Act of February 28, 1920 (ratifying the *Woodbury* interpretation) clearly establish that the ICC's jurisdiction includes transportation from a foreign country to the United States. Because the scope of the ICC jurisdiction provision is co-extensive with the scope of Carmack's applicability and because the *Woodbury* Court interpreted the "from ... to" language as applying to goods traveling in foreign commerce regardless of direction, it follows that the "from ... to" language in Carmack also applies to goods in foreign commerce regardless of the direction of travel. We therefore conclude that Carmack applies to the domestic interstate leg of the Kubota shipment.[14]

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[14] We note that, even if we were to view Union Pacific's domestic, interstate carriage as a shipment entirely distinct from the rest of the transport, Carmack would still apply by virtue of 49

III. The Carmack Amendment and COGSA

Because the period of responsibility and himalaya clauses in MOL's through bills of lading together extend COGSA's terms to subcontractors, like Union Pacific, the fact that Carmack also applies to the Union Pacific leg of the Kubota shipment creates a potential conflict between two different liability regimes. In our view, however, the conflict is not between two federal laws but rather between one federal law (Carmack) and a contract that, although incorporating the terms of another statute (COGSA), nevertheless lacks statute-like status. Section 1307 of COGSA states:

> Nothing contained in [COGSA] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

46 U.S.C. app. § 1307. Because COGSA only applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship," *id.* § 1301(e), courts have consistently held that when COGSA is extended by contract beyond the tackles, as contemplated by § 1307, the statute does not apply of its own force, or *ex proprio vigore*, but rather as a contractual term. *See Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 557 (2d Cir.2000); *Colgate Palmolive Co. v. S/S Dart*

U.S.C. § 10501(a)(2)(A), because the Union Pacific waybill covers the interstate carriage of goods.

Canada, 724 F.2d 313, 315 (2d Cir.1983); *Pannell v. U.S. Lines Co.*, 263 F.2d 497, 498 (2d Cir.1959); *Inst. of London Underwriters v. Sea-Land Serv., Inc.*, 881 F.2d 761, 764-66 (9th Cir.1989); *Croft & Scully Co. v. M/V SKULPTOR VUCHETICH*, 664 F.2d 1277, 1280 (5th Cir.1982); *Commonwealth Petrochems., Inc. v. S/S Puerto Rico*, 607 F.2d 322, 325 (4th Cir.1979).

This view of COGSA finds further support in the fact that Congress explicitly provided that contracts extending the statute's reach in ways other than over land—in particular, contractual extensions covering trade between United States ports (or "coastwise trade")—do have statutory force. COGSA by its terms only applies to shipping "to or from ports of the United States" and is further limited to foreign trade. 46 U.S.C. app. § 1300. Shipping between the ports of a single nation falls under the jurisdiction of that nation alone and therefore does not raise the uniformity concerns the Hague Rules were intended to address. *See Commonwealth Petrochems.*, 607 F.2d at 327; *see also* Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609, 622-27 (1996). In the United States, coastwise trade remains governed by the Harter Act.[15] Although

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[15] Enacted in 1898, the Harter Act imposes a duty of "proper loading, stowage, custody, care, [and] proper delivery." 46 U.S.C. app. § 190. It prohibits any exculpation clause in a bill of lading or shipping document relieving the carrier from liability arising out of negligence or fault in loading, stowage, custody, care, delivery of cargo, and the provision of a properly equipped and seaworthy vessel. *See* 46 U.S.C. app. §§ 190, 191. Like COGSA, the Harter Act also provides for exoneration of the carrier in certain circumstances, including "errors of navigation," "dangers of the sea," and "acts of God." 46 U.S.C. app. § 192. Although COGSA superseded the Harter Act with respect to the tackle-to-tackle

COGSA left the Harter Act's application to domestic shipping largely unaffected, Congress created in COGSA what has become known as the "coastwise option," which authorizes carriers and shippers in domestic trade to, in effect, contractually opt out of the Harter Act and into the COGSA regime, as long as

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period of international shipments, the Harter Act nevertheless continues to govern the carrier's duties in international shipments prior to the time when the goods are loaded on the ship and after the time they are discharged from the ship, until "proper delivery." *See Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741-42 (4th Cir.1993) ("['Proper delivery' includes] actual or constructive delivery. Actual delivery consists [of] completely transferring the possession and control of the goods from the vessel to the consignee or his agent. Constructive delivery occurs where the goods are discharged from the ship upon a fit wharf and the consignee receives due and reasonable notice that the goods have been discharged and has a reasonable opportunity to remove the goods or put them under proper care and custody." (quoting *B. Elliott (Canada) Ltd. v. John T. Clark & Son*, 704 F.2d 1305, 1308 (4th Cir.1983) (in turn quoting *Orient Overseas Line v. Globemaster Baltimore, Inc.*, 33 Md.App. 372, 365 A.2d 325, 335-36 (1976)))). "It is clear from the legislative history that Congress intended the Harter Act to continue to apply to all cases not governed by COGSA." 2A-II BENEDICT ON ADMIRALTY § 14 (7th ed.1998). Because COGSA only applies to the tackle-to-tackle period in international shipments, *see* 46 U.S.C. app. § 1300 ("Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, *in foreign trade*, shall have effect subject to the provisions of this Act." (emphasis added)), the Harter Act continues to apply to trade between United States ports. *Id.* Similarly, because COGSA specifically exempts from its coverage goods stored on the deck of a ship, *see* 46 U.S.C. app. § 1304, courts have also held that the Harter Act applies to damage to goods in international trade during the tackle-to-tackle period, as long as the goods were carried on deck, *see, e.g., Blanchard Lumber Co. v. S.S. Anthony II*, 259 F.Supp. 857, 865 (S.D.N.Y.1966).

they do so with an "express statement." 46 U.S.C. app. § 1312; *see also* 2A-V BENEDICT ON ADMIRALTY § 42 (7th ed.1998). Thus, there is little dispute that Congress intended for certain contracts extending COGSA's reach to supersede prevailing federal statutes.

However, Congress made an important textual distinction between contracts extending the statute's terms to coastwise trade under § 1312 and contracts extending COGSA's terms beyond the tackles, pursuant to § 1307. With respect to contracts under the coastwise option, Congress made clear that such contracts "shall be subjected [to COGSA] as fully as if subject... by the express provisions of [the statute]." 46 U.S.C. app. § 1312. Thus, when extended by contract to cover coastwise trade, COGSA does indeed act *ex proprio vigore*.[16] However, with respect to period of responsibility provisions, like the one in the MOL bills of lading, Congress simply stated that "[n]othing [in

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[16] Accordingly, the First and Ninth Circuits, along with the Southern District of New York, have held that COGSA applies with the force of statute when a bill of lading in domestic trade incorporates COGSA's terms with an "express statement." *Hanover Ins. Co. v. Shulman Transp. Enters., Inc.*, 581 F.2d 268, 270 & n. 2 (1st Cir.1978); *Pan Am. World Airways v. Cal. Stevedore & Ballast Co.*, 559 F.2d 1173, 1175 n. 3 (9th Cir.1977) (per curiam); *Orion Ins. Co. v. M/V "Humacao"*, 851 F.Supp. 575, 578 (S.D.N.Y.1994); *Watermill Export, Inc. v. MV Ponce*, 506 F.Supp. 612, 614-15 (S.D.N.Y.1981). The Fourth and Fifth Circuits, on the other hand, have held that, notwithstanding § 1312's language to the contrary, COGSA applies simply as a contractual term even when extended to domestic bills of lading. *Commonwealth Petrochems.*, 607 F.2d at 326-27; *Ralston Purina Co. v. Barge Juneau & Gulf Caribbean Marine Lines, Inc.*, 619 F.2d 374, 375-76 (5th Cir.1980) (per curiam). *But see Burdines, Inc. v. Pan-Atlantic S.S. Corp.*, 199 F.2d 571, 573 (5th Cir.1952).

COGSA] shall prevent a carrier or a shipper from entering into any [such] agreement." *Id.* § 1307. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972) (alteration in original)). Therefore, that Congress, in enacting § 1307, omitted language similar to the language in § 1312 is persuasive evidence that Congress did not wish for period of responsibility clauses to have the force of statute with the capability to supersede federal law.

In light of the contractual nature of period of responsibility provisions, courts have routinely held that contracts extending COGSA beyond the tackles must give way to conflicting law. *See Colgate Palmolive*, 724 F.2d at 315-16 (refusing to apply COGSA $500-per-package limitation in view of governing state law because "provisions of COGSA incorporated by contract can be valid only insofar as they do not conflict with applicable state law"); *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 739 (4th Cir.1993) ("To portions of the carriage that take place prior to loading or after discharge and therefore are not covered by the terms of COGSA, the Harter Act controls."); *Uncle Ben's Int'l Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 217 (5th Cir.1988) (holding that "[i]f the parties extend the provisions of COGSA to the preloading phase, any inconsistency with the Harter Act must yield to the Harter Act" but

finding that the contractual incorporation of COGSA's one-year statute of limitation was not inconsistent with the Harter Act); *Toshiba Int'l Corp.*, 841 F.Supp. at 128 (suggesting that if Carmack applied to the inland portion of the journey, it would disallow the COGSA liability limitations incorporated by contract).[17] *But see Schramm, Inc. v. Shipco Transp., Inc.*, 364 F.3d 560, 565 (4th Cir.2004) (assuming without discussion that a contract incorporating COGSA's terms wins out over any conflict with the Harter Act).

In fact, in cases involving foreign trade where there is a conflict between a period of responsibility clause and the Harter Act—which, in international shipments, applies from the time when the goods are unloaded until "proper delivery"—the principal issue is not whether a contract incorporating COGSA's terms must give way to conflicting provisions in the Harter Act, but rather whether there is in fact a conflict. "Because COGSA and the Harter Act are so similar, it often makes no differencewhich statute applies." 2A-II BENEDICT ON ADMIRALTY § 14 (7th 9 ed.1998). Nevertheless, when courts have identified inconsistencies between the two statutes, they have held that the Harter Act supersedes the period of responsibility clause. For example, in *R.L. Pritchard & Co. v. S.S. Hellenic Laurel*, 342 F.Supp. 388, 391

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[17] In *Norfolk Southern Ry. Co. v. Kirby*, the Supreme Court held that a through bill of lading consisting of a "substantial" sea component is governed by federal law, even if the bill covers inland carriage. 543 U.S. at 27, 125 S.Ct. 385. Thus, *Kirby* would appear to effectively overrule those cases, like *Colgate Palmolive*, that hold that contracts extending COGSA's terms beyond the tackles must yield to conflicting state law, *but only to the extent that the bills of lading in those cases consist of a sea component that is "substantial."*

(S.D.N.Y.1972), one of our district court's noted that "[i]nsofar as the provisions of COGSA are inconsistent with the Harter Act, they cannot be incorporated into a bill of lading to cover the responsibilities of the carrier after discharge and before delivery of the cargo." *Id.* at 391. The court held that the "fire exemption" provision of COGSA, 49 U.S.C. § 1304(2)(b)—under which the carrier is liable for losses due to fire only if caused by certain types of negligence is inconsistent with the Harter Act and therefore "null and void." *R.L. Pritchard & Co.*, 342 F.Supp. at 391. Similarly, in *United States v. Ultramar Shipping Co.*, 685 F.Supp. 887 (S.D.N.Y.1987), the court found that the carrier's burden of proof for demonstrating due diligence in assuring seaworthiness is more relaxed under COGSA than under the Harter Act. *See id.* at 894-95. Accordingly, the court held that the period of responsibility clause must yield to the Harter Act. Finally, in *Birdsall, Inc. v. Tramore Trading Co.*, 771 F.Supp. 1193, 1199 (S.D.Fla.1991), the United States District Court for the Southern District of Florida held that COGSA's statute of limitations cannot supersede the absence of such a limitation in the Harter Act for the pre- and post-loading phases. *See id.* at 896.

These cases are consistent with the policy motivating COGSA. The driving force behind COGSA was a need for uniformity in the law governing the contracts central to maritime commerce. *See Vimar Seguros y Reaseguros, S.A.*, 515 U.S. at 537, 115 S.Ct. 2322. Uniformity was considered necessary to minimize the costs arising in maritime transactions that touch the shores of, and involve parties haling from, the numerous maritime nations. For the carriers, shippers, insurers, cargo underwriters, and financial

intermediaries involved in these transactions, this harmonization of the law governing the agreements that drive international shipping eliminated much of the uncertainty and unpredictability that prevailed before the adoption of the Hague Rules and COGSA, when a party would not know before the fact which law would control in the event of a lawsuit under the bill of lading. However, the Hague Rules (and by extension COGSA) only sought to achieve uniformity in the law governing the international carriage of goods *by sea*. Other types of carriage, including land-based carriage, were to be governed by the law of the individual nations that participated in the international convention at the Hague. *See* Sturley, *Uniformity in the Law*, *supra*, at 573-74. The United States' decision to preserve the application of the Harter Act did not "sacrifice international uniformity for the simple reason that the international community made no effort to establish a uniform rule" governing the carriage of goods outside of the tackle-to-tackle period. *Id.*

Consistent with the treaty's intent, Congress specifically provided in COGSA that the statute would have no effect upon laws applying to the inland carriage of goods:

> Nothing in [COGSA] shall be construed as superseding any part of [the Harter Act], or of any other law which would be applicable in the absence of [COGSA], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

46 U.S.C. app. § 1311. As Senator White explained in the Commerce Committee's report of the bill to Congress, "[COGSA] supersedes the so-called 'Harter

Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. Otherwise our law remains precisely as it is, unaffected and unimpaired by the proposed legislation." 1 Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules, at 589 (Michael F. Sturley ed., 1990). Although § 1311 makes specific reference to the Harter Act, it also preserves from COGSA's reach "*any other law* which would be applicable in the absence of [COGSA], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship." 46 U.S.C. app. § 1311 (emphasis added). Carmack is such a law. Accordingly, we hold that the contractual provision extending COGSA's terms inland must yield to Carmack. Therefore, we hold that Carmack governs Union Pacific's liability in this case.

Union Pacific would have us rely upon the Supreme Court's recent decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004), but *Kirby* does not alter our analysis. In *Kirby*, the Supreme Court held that federal law should govern the interpretation of a through bill of lading consisting of sea and land portions, as long as the sea portions are "substantial." *Id.* at 27, 125 S.Ct. 385. The shipper, Kirby, had hired a freight forwarder to arrange for the shipment of machinery from Switzerland to Huntsville, Alabama. The freight forwarder hired a German ocean shipping company to transport the cargo, and the ocean shipping company then contracted with a railroad, Norfolk Southern, to carry the goods by rail from the port of discharge—Savannah, Georgia—to the final destination,

Huntsville, Alabama. *See id.* at 19, 125 S.Ct. 385. The bill of lading between the ocean shipping company and Norfolk Southern contained a period of responsibility clause and a himalaya clause conferring the benefit of COGSA's $500-per-package liability limitation on independent contractors, like Norfolk Southern. *See id.* at 19-20, 125 S.Ct. 385. When the goods were damaged after the train derailed en route to Huntsville, Norfolk Southern claimed that its liability was limited to $500 per package, as provided for in the bill of lading.[18] The cargo owner, Kirby, argued that the period of responsibility clause should be interpreted in light of state agency law principles, in which case the railroad was not entitled to benefit from the himalaya clause because the freight forwarder was not acting as Kirby's agent when it received the ocean shipping company's bill of lading. *Id.* at 22, 125 S.Ct. 385.

The Supreme Court found that the bill of lading, although covering carriage by both sea and land, was nevertheless a maritime contract to which federal law applied. *See id.* at 23-27, 125 S.Ct. 385. Adopting a

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[18] Norfolk Southern also sought to insulate itself by relying on the himalaya clause in the bill of lading between the freight forwarder and the ocean shipping company. However, the interpretation of that himalaya clause raised the question of the meaning of Supreme Court precedent rather than which law, federal or state, to apply. *See Kirby*, 543 U.S. at 30, 125 S.Ct. 385 (explaining that the interpretation "turns only on whether the Eleventh Circuit correctly applied this Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959)"). Thus, it is less relevant to our discussion here, which is concerned with the correct law to apply when federal laws conflict with a contract extending COGSA's reach.

conceptual approach, the Court stated that "so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract ... [even if] it also provides for some land carriage.... If a bill's *sea* components are insubstantial, [however,] then the bill is not a maritime contract." *Id.* at 27, 125 S.Ct. 385. The Court further explained that in applying federal law, it was avoiding the "[c]onfusion and inefficiency [that] will inevitably result if more than one body of law governs a given contract's meaning," *id.* at 29, 125 S.Ct. 385, and thereby was promoting "the uniformity of general maritime law," *id.* at 28, 125 S.Ct. 385. The Court noted that in applying a single body of law to the contract, it was also "reinforc[ing] the liability regime Congress established in COGSA." *Id.* at 29, 125 S.Ct. 385.

Union Pacific contends that the same concern for uniformity and consistency in interpreting international maritime contracts "demands that provisions of 'through bills of lading' which extend limitations of liability to inland carriers should be analyzed under COGSA and not the Carmack Amendment." We cannot read *Kirby* so broadly. In *Kirby*, the Court was primarily concerned with the lack of uniformity and consistency that would result if *state* law were applied to contracts extending COGSA's terms inland. That is a significant concern, especially for the myriad parties potentially responsible for an inland carrier's damage to goods who cannot know before the fact which state law might define the contours of their liability. The Supreme Court's decision that national law will govern the interpretation of an international bill of lading with a

substantial sea component adroitly avoids that problem.

However, in *Kirby*, the cargo owner failed to raise the issue of Carmack's applicability. *See* Brief for the United States as *Amicus Curiae* at 12, *Norfolk So. Ry. Co. v. Kirby*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004) (No. 02-1028), 2003 WL 22762727. Therefore the only issue before the Court was the interaction between *state* law and contractual provisions extending COGSA's terms to a rail carrier. Consequently, *Kirby* only established the principle that maritime contracts should be interpreted in light of federal maritime law. Notwithstanding Union Pacific's argument to the contrary, it does not follow from that principle that the only federal law to apply is COGSA. Nor can we accept the argument that Carmack—what Union Pacific refers to as a "non-maritime federal law"—cannot play a role in governing the terms of the domestic carriage portion of a maritime contract. Federal maritime law consists of both federal common law and federal statutes. Although federal common law plays a more prominent role in the maritime context than in others, where it remains largely interstitial, it nevertheless only applies in the absence of a relevant statute. *See, e.g., E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) ("Absent a relevant statute, the general maritime law, as developed by the judiciary, applies."). What constitutes a relevant federal statute is determined solely by whether a given statute applies by its own terms to a particular set of facts. There is no additional requirement that only those federal statutes that a court deems "inherently maritime" can govern the interpretation of a maritime contract.

To apply COGSA here to the exclusion of Carmack would be to contradict well-established circuit precedent holding that period of responsibility provisions do not have statute-like status and would undermine the text of the statute itself, which explicitly states that COGSA does not affect laws governing the carriage of goods prior to loading and after discharge. 49 U.S.C. app. § 1311.[19] We cannot interpret the *Kirby* Court's language concerning the policy underlying COGSA—language that at most merely supported, but was far from central, to the Court's holding that federal law should apply instead of *state* law—as implying that a contract extending COGSA inland should supersede an otherwise applicable *federal* law. Without further guidance from the Supreme Court or from Congress, we must rely on precedent and the plain language of the statutory scheme.

IV. Compliance with the Carmack Amendment and the Staggers Rail Act

Now that we have determined that Carmack applies to the domestic rail portion of an international

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[19] Section 1311 was irrelevant to the Court's analysis in *Kirby*. Once again, § 1311 states:

> Nothing in [COGSA] shall be construed as superseding any part of [the Harter Act], or of *any other law which would be applicable in the absence of [COGSA]*, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

46 U.S.C. app. § 1311. Once the *Kirby* Court had determined that federal, not state, law governed the bill of lading, state law would not have been "applicable in the absence of [COGSA]," and therefore § 1311 did not require that the period of responsibility provision yield to state law.

shipment originating in a foreign country and traveling under a through bill of lading, even where the parties have extended COGSA's liability provisions to domestic rail carriers, one question remains: when Union Pacific negotiated the applicable terms of carriage of Kubota's tractors, did it provide the shipper an opportunity, consistent with Staggers, *see* 49 U.S.C. §§ 10502(e); 11706(a), (c)(3), to receive full Carmack liability coverage as well as "alternative terms"? If so, then under Carmack and Staggers, *see* 49 U.S.C. § 11706(c)(3), such alternative terms would circumscribe Union Pacific's liability. If not, and in the absence of any other defense, then Union Pacific, having failed to comply with the Carmack and Staggers requirements, would be liable for the full value of the tractors. Because the district court determined that COGSA, rather than Carmack, applied to the Kubota shipment, it did not have the opportunity to address whether Union Pacific satisfied Staggers. Moreover, the question of whether Union Pacific satisfied Staggers raises potential issues of fact and law that the district court, in the first instance, is in a better position to evaluate than are we. Accordingly, we find it prudent to remand the case to the district court to address whether Union Pacific satisfied the requirements of 49 U.S.C. § 10502(e).

We see no reason, however, to refrain from addressing Union Pacific's argument, advanced on appeal, that the MOL bills of lading satisfy Staggers. Union Pacific urges us to view the $500-per-package liability limitation in the MOL bills of lading as "alternative terms" and contends that Clause 29(2) of the MOL bills "gave Kubota the opportunity to declare the full value of the cargo and receive ful. value

coverage as required by 49 U.S.C. § 11706." Clause 29(2) provides:

> If the US COGSA applies as Clause 29(1) above, neither the Carrier nor the Vessel shall, in any event, be or become liable for any loss or damage to or in connection with the Goods in an amount exceeding $500.00 per package, lawful money of the United States or in the case of Goods not shipped in packages, per customary freight unit, unless the value of the Goods has been declared and inserted in the declared value box on the face hereof, in which case Clause 6(2) shall apply.

Union Pacific's argument is without merit because, although Clause 29(2) provides the option of full coverage under COGSA, it does not provide the option of full coverage under Carmack. Of course, substituting the liability scheme available under COGSA for that available under Carmack might be a harmless error if the liability rules under COGSA and Carmack were identical. But as discussed above, COGSA liability is grounded in negligence while Carmack liability is rooted in strict liability. Thus, Union Pacific's argument that it is liable under either COGSA's or Carmack's standard of care misses the point. Because COGSA and Carmack create two different liability standards, we cannot assume that the shipper contracting with Union Pacific had the opportunity to choose among several types of liability coverage and opted not to pay a higher freight rate for full coverage under a strict liability rule.

While we hold that the MOL bills of lading do not satisfy Staggers, we express no opinion as to any other potential contention that Union Pacific complied with the requirements of Carmack and Staggers.

Conclusion

For the foregoing reasons, we conclude that Carmack governs Union Pacific's liability in this case. We further conclude that the MOL bills of lading do not satisfy the Staggers requirement that the shipper be given an opportunity to receive full Carmack liability coverage before accepting alternative terms. We remand this case to the district court to consider any other potential arguments that Union Pacific might raise that it complied with the requirements of Carmack and Staggers. Accordingly, we vacate the judgment of the district court and remand the case to the court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
SOMPO JAPAN INSURANCE
OF AMERICA,

Plaintiff,

-against-

ORDER
02 Civ. 9523 (DAB)

UNION PACIFIC RAILROAD
COMPANY,

Defendant.
----------X

DEBORAH A. BATTS, United States District Judge.

The court is in receipt of the Stipulation and Order signed by both parties in October 2006. Having reviewed the Second Circuit decision in Sompo Japan v. Union Pacific, 456 F.3d 54 (2d Cir. 2006), and the submissions of both parties, the Court hereby vacates the decision entered November 22, 2005 in the instant case.

This matter will be referred to the Magistrate Judge for an inquest to determine damages.

SO ORDERED.

Dated: New York, New York
December 15, 2006

s/Deborah A. Batts
Deborah A. Batts
United States District Judge

United States District Court,
Southern District of New York.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA,
Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

No. 03 Civ. 1604(CM)
August 2, 2007.

2007 WL 2230091

DECISION AND ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

McMahon, J.

Plaintiff Sompo Japan Insurance Company ("Sompo") originally filed a complaint against Defendant Union Pacific Railroad Company ("UP") for damages related to a shipment of tractors from Tokyo, Japan to Swanee, Georgia. The District Court (Duffy, J.) granted partial summary judgment in favor of UP, giving effect to the contract for carriage which incorporated by reference the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1301-15, and declining to apply the Carmack Amendment (49 U.S.C. § 11706) and the Staggers Act (49 U.S.C. § 10502(e)),

effectively limiting UP's liability to $500 per parcel. *See Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, No. 03 Civ. 1604, 2003 WL 22510361 (S.D.N.Y. Nov. 3, 2003) ("Sompo I"). Sompo appealed the *Sompo I* decision to the Second Circuit.

This case comes before this court on remand from the Second Circuit, which reviewed the district court's findings de novo, and resolved the previously unsettled question of what law applies to the United States rail leg of an international multimodal shipment. *See Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, 456 F.3d 54 (2d Cir.2006) ("Sompo II"). The Second Circuit undertook a detailed analysis of COGSA, the Carmack Amendment, and the Staggers Act to determine which regime should be applied.[1] It concluded that the Carmack Amendment and the Staggers Act should be applied; refused to apply COGSA even though it appeared to be incorporated by reference in a through bill of lading; and reversed and remanded. The mandate stated that the district court was "to consider any other potential arguments that Union Pacific might raise that it complied with the requirements of Carmack and Staggers." *Sompo II*, 456 F.3d at 76.

Sompo renewed its prior motion for partial summary judgment on October 13, 2006. UP filed an opposition and renewed its prior cross-motion for partial summary judgment on November 7, 2006. On July 5, 2007, the parties stipulated that principal amount of damages suffered by the plaintiff was

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[1] As the Second Circuit has already given a thorough and complete discussion of the history and application of Carmack, Staggers, and COGSA, I will not do so here.

$328,129.32 and agreed that the case could be decided on the papers.

I. Facts

Except where noted, the material facts are undisputed. Liability and the amount of actual damages incurred are not in dispute.

Kubota Tractor Corporation ("Kubota") hired Mitsui OSK Line Ltd. ("MOL"), an ocean shipping company, to ship thirty-two tractors from Tokyo, Japan to Swanee, Georgia. This shipment was insured by the plaintiff for $479,500. MOL issued intermodal 'through' bills of lading for the shipment. Bills of lading are contracts that "record that a carrier has received goods from the party that wishes to ship them, state the terms of carriage, and serve as evidence of the contract for carriage." *Sompo II*, 456 F.3d at 56 (citing *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18, 125 S.Ct. 385 (2004)). These bills covered the entire journey from start to finish, including both the ocean and the land legs of transport, and multiple modes of transportation, including ocean and rail carriage.

MOL shipped the tractors by ocean transit from Tokyo, Japan to Los Angeles, California. In Los Angeles, the tractors were transferred from MOL's ship to MOL's subcontractor, UP, for rail carriage to Georgia. The shipment was en route when the UP train carrying the cargo derailed in Texas. The tractors were severely damaged, and Kubota collected the full value of the tractors from Sompo. Sompo subrogated the claim and brought the instant suit against defendant UP.

There is some dispute as to how the shipment was subcontracted to UP. *See Sompo II*, 456 F.3d at 56 n. 3; *Sompo I*, 2003 WL 22510361, at *1 n. 2. What is certain

is that, at some point, UP entered into an agreement with CSX Intermodal ("CSXI") to carry certain goods. UP alleges the Kubota tractors were shipped pursuant to this agreement, while Sompo and MOL dispute that they ever involved CSXI.

The three electronic waybills, separate from the bills of lading MOL issued, that UP issued to CSXI for the shipment make reference to SPD-5152. (Def.'s Rule 56.1 Statement ¶ 6; Pl.'s Ex. B.) UP has a contract with CSXI, numbered SPT-5152, providing that UP's liability for loss of or damage to the lading in any container shall be subject to the released values as established by UP in UP's Circular 1000-Series and its successors. (Def.'s Rule 56.1 Statement ¶¶ 9, 10.) The parties dispute whether "SPD-5152" is a typo and whether or not SPT-5152 is applicable in this case. (Def.'s Rule 56.1 Statement ¶ 8; Pf.'s Response to Def.'s Rule 56.1 Statement ¶ 8.)

The SP-1000-B circular was succeeded by UP Exempt Circular 20-B on January 1, 1998. (Def.'s Rule 56.1 Statement ¶ 11.) Circular 20-B contains Item 142-B(3)(L), which purports to limit liability in international shipments under an intermodal or Ocean Bill of Lading to $500.00 per package. (Pl.'s Ex. T.) Circular 20-B also contains Items 142-B(1)(C) and 143-B, which purport to offer Carmack liability on domestic shipments originating in the United States. (Pl.'s Ex. T.)

II. Standard of Review

A motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure will be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U .S.

317, 106 S.Ct. 2548 (1986): *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). The moving party always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir.1994) (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553); *see also* Fed.R.Civ.P. 56(c). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir.2005) (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510).

In deciding the motion, a court draws all reasonable inferences and resolves any ambiguities in favor of the nonmoving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962) (per curiam); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir.1987). Summary judgment for the moving party is appropriate "where the nonmovant's evidence is merely colorable, conclusory, speculative, or not significantly probative." *Travelers Ins. Co. v. Broadway W. St. Assocs.*, 164 F.R.D. 154, 160 (S.D.N.Y.1995) (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510).

"When faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other. Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Heublein, Inc. v. United*

States, 996 F.2d 1455, 1461 (2d Cir.1993) (citations and internal quotation marks omitted). Of course, if no purported issues of fact prove to be genuine and material, then summary judgment can be properly granted.

The only issue of fact that is in controversy concerns how MOL, UP, and CSXI were involved in the contract. This dispute, while genuine, ultimately proves to be immaterial, and summary judgment can be granted as a matter of law.

III. Discussion

As the parties have stipulated to the amount of actual damages incurred by Sompo, the sole issue remaining in this case is whether UP's liability is limited to $16,000 ($500 per parcel) or the stipulated $328,192.32 of damages that Sompo actually incurred.

Sompo advances three arguments in its renewed motion: (1) that the issue of whether UP is liable for full Carmack liability has already been litigated and is thus precluded; (2) that, in light of the Second Circuit's remand instructions in *Sampo II*, UP cannot raise new arguments about the applicability of Carmack; and (3) that the UP circular does not offer full liability pursuant to Carmack ("Carmack liability").

UP advances two arguments in its counter-motion: (1) that Carmack does not apply because UP alleges it utilized a § 10709 contract; and in the alternative, (2) that UP complied with Carmack and Staggers and provided the option of full Carmack liability.

The parties' arguments are fairly distinct and do not involve any factual disputes, save for the dispute over whether UP offered full Carmack liability. As a result, the various issues are examined at the same time. The court finds that, given the decision in *Sompo*

II, UP is precluded from raising new arguments about the applicability of Carmack, and there is no need to examine the issue of collateral estoppel. The court further finds that, in addressing the mandate from the Second Circuit, UP did not comply with the provisions of Carmack and Staggers. Accordingly, UP is found to be liable for the stipulated amount of $328,192.32.

A. It is the law of the case that Carmack governs UP's liability

1. The law of the case was announced by the Second Circuit

The Second Circuit concluded that, for the rail leg of an intermodal international shipment, Carmack trumps a contractual extension of COGSA. *Sompo II*, 456 F.3d at 75. Accordingly, the Second Circuit "conclude[d] that Carmack governs Union Pacific's liability in this case." *Id.* at 76. This is the law of the case as given by the Second Circuit. It is determinative and it *precludes* any argument that Carmack does not govern. The panel found that only "one question remain[ed]: when Union Pacific negotiated the applicable terms of carriage of Kubota's tractors, did it provide the shipper an opportunity, consistent with Staggers, to receive full Carmack liability coverage as well as 'alternative terms'?" *Id.* at 75 (citations omitted).

2. This finding of the law of the case is confirmed by the limited mandate given to this court

The Second Circuit issued a mandate that requires this court "to consider any other potential arguments that Union Pacific might raise that it complied with the requirements of Carmack and Staggers ." *Id.* at 76. The panel found it "prudent to remand the case to the district court to address whether Union Pacific

satisfied the requirements of 49 U.S.C. § 10502(e)." *Id.* at 75.

"Under the doctrine of law of the case, a district court generally may not deviate from a mandate issued by an appellate court." *In re Ivan F. Boesky Securities Litigation.* 957 F.2d 65, 69 (2d Cir.1992). "The district court's actions on remand should not be inconsistent with either the express terms or the spirit of the mandate." *Id.* "[W]here issues have been explicitly or implicitly decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court." *United States v. Minicone,* 994 F.2d 86, 89 (2d Cir.1993); *see also Day v. Moscow,* 955 F.2d 807, 813 (2d Cir.1992).

The Second Circuit has spoken on the issue of raising new arguments on remand: "It has become almost a judicial commonplace to say the litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case." *United States v. Cirami,* 563 F.2d 26, 33 (2d Cir.1977). "To determine whether an issue remains open for reconsideration on remand, the trial court should look to both the specific dictates of the remand order as well as the broader 'spirit of the mandate.' " *United States v. Ben Zvi,* 242 F.3d 89, 95 (2d Cir.2001).

As the scope of the mandate was compliance with the requirements of 49 U.S.C. § 10502(e), all other issues beyond that question were implicitly or explicitly decided on appeal. The 'spirit of the mandate' is such that this court is obliged to confine

itself to consider only the § 10502(e) issue and nothing further.

I will, therefore, not consider any arguments against the application of Carmack. Nor is it necessary to address collateral estoppel arguments based on a decision by Judge Batts in *another* case against UP. The Second Circuit has already determined the law of *this case* in *Sompo II* and decided against UP. The only thing I will consider is what the Second Circuit told me to consider in its mandate.

B. There was no offer of Carmack liability in the shipping documents

1. The paper trail is so confusing that no reasonable shipper would have been on notice of a limitation in liability

UP alleges that the following chain of facts, inferences, and papers should have put Kubota on notice of a choice between a limitation in liability and an offer of Carmack liability contained in the UP Exempt 20-B Circular: (1) CSXI booked the inland rail carriage with UP on behalf of MOL; (2) CSXI noted at the bottom of the electronic waybills "Customer furnished contract data-SPD 005152"; (3) SPD 005152 actually referred to a contract for rail services between CSXI and Southern Pacific numbered SPT-5152; (4) Southern Pacific was merged into UP, and the contract was adopted by UP; (5) SPT-5152 makes reference to and incorporates the SP-1000 circular series; (6) at the time of the shipment, SP-1000 had been cancelled, and CSXI was on notice that it was replaced by UP Exempt Circular 20-B; (7) the 20-B circular contains Items 142-B and 143-B; (8) Items 142-B and 143-B contain terms which either limit liability to $500 per parcel under COGSA or offer Carmack liability for

domestic shipments. (*See* Def.'s Mem. Opp. Renewed Mot. Summ. J. 3-4; Pl.'s Mem. Supp. Renewed Mot. Summ. J. 6.)

Contractual provisions which purport to limit a carrier's liability are enforceable only if they are (1) reasonably communicative so as to result in a fair, open, just and reasonable agreement; and (2) offer the shipper a possibility of a higher recovery by paying a higher rate. *See Nippon Fire & Marine Ins. Co. v. Skyway Freight Systems, Inc.*, 235 F.3d 53, 59-60 (2d Cir.2000). The chain of inferences and documents leading to any indication of liability-while not quite to the level of the "Twelve Days of Christmas," as Sompo alleges-certainly goes well beyond what is reasonable for a shipper to know when contracting for the shipment of goods. The reference to a contract is unclear and does not indicate that it limits liability merely by stating "Customer furnished contract data-SPD 005152"; the reference to a contract is incorrect, citing SPD-5152 instead of SPT-5152; the contract refers to a now-defunct circular, the 1000-Series; a new circular, UP Exempt Circular 20-B, supercedes the now-defunct circular; and the shipper was never given a copy of the CSXI-UP agreement nor was the shipper a party to this private agreement. No reasonable shipper would have known of any limitation in liability as a result of this chain.

2. UP did not offer Carmack liability for international shipments

UP argues that Carmack liability is offered by Item 143-B in the circular. Even if this court assumes that the circular was properly integrated into the contracts, UP has not established that it offered Carmack liability for international shipments.

UP argues that Item 143-B (*see* Pl.'s Ex. T) provides for "full value and other liability terms" under Carmack. (Def.'s Mem. Opp. Renewed Mot. Summ. J. 15.) However, Item 142-B(1)(C) explicitly limits the terms of Item 143-B to "domestic moves that originate in the United States." (*See* Pl.'s Ex. T.) As UP has already argued that Item 142-B(3)(L) applies because the tractors were part of an *international shipment*, it is odd indeed for UP to turn around and allege that a purely domestic provision applies. UP cannot have its cake and eat it, too. The shipment is either part of an international shipment, or it is a domestic move. As UP has conceded that the tractors were part of an international shipment throughout its papers and motions, and UP has sidestepped the issue of 142-B(1)(C) limiting the offer of Carmack liability to domestic shipments, I must conclude that no Carmack liability was offered for the shipment in question.

Conclusion

For the forgoing reasons, plaintiff Sompo's motion for partial summary judgment is granted, and defendant UP's motion for partial summary judgment is denied. As there are no outstanding issues, damages of $328,192.32 are awarded to Plaintiff. The Clerk of the Court is directed to enter judgment for plaintiff and thereafter to close the case.

This constitutes the decision and order of the Court.

United States District Court,
Southern District of New York.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA,
Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

No. 02 Civ. 9523(DAB).
September 26, 2007.

2007 WL 4859462

ORDER

DEBORAH A. BATTS, District Judge.

Sompo Japan Insurance Company of America ("Sompo") and Olympus America, Inc. ("Olympus") (collectively, "Plaintiffs") bring this action against Union Pacific Railroad Company ("UP" or "Defendant"), seeking damages for a stolen shipment of digital cameras.

Pending before the Court is Plaintiffs' Motion for Summary Judgment regarding the limitation of damages in this action. For the reasons that follow, Summary Judgment is GRANTED in favor of Plaintiffs.

I. *Background*

A. Procedural History

On November 21, 2005, this Court granted Defendant's Motion for Partial Summary Judgment, in favor of Defendant. In that ruling, the Court found a contractual extension of the United States Carriage o Goods by Sea Act (COGSA), and limited UP's liabilit to $500.00 per package. This decision was vacated on December 15, 2006, in light of the Second Circuit's ruling in *Sompo Japan v. Union Pacific R.R.*, 456 F.3d 54 (2d Cir.2006) (hereinafter, *"Sompo II"*); the Second Circuit held that the Carmack Amendment and the Staggers Act should be applied to the domestic rail portion of a continuous intermodal shipment originating in a foreign country, and that an ocean carrier could not trump Carmack requirements by contractually extending COGSA's terms to a domestic rail subcontractor. Given the undecided Summary Judgment Motion before the Court, the Court's December 15, 2006 Order also referred the matter to Magistrate Judge for a damages inquest.

On January 16, 2007, this Court received a letter request from Defendant, asking the Court to stay action in this case pending the outcome of another matter granted cert by the United States Supreme Court, *Altadis USA, Inc. v. Sea Star Line, et al.*, 458 F.3d 1288 (11th Cir.2006). By letter dated January 19, 2007, Plaintiffs objected to a stay in this case. On January 24, 2007, this Court found that a Supreme Court ruling in *Altadis* might have an impact on the instant case. Accordingly, the Court issued an Order that stayed all action in this case, including an ongoing damages inquest, pending the outcome of a Supreme Court ruling in *Altadis.*

On February 13, 2007 this Court received correspondence from Plaintiff, informing the Court that *Altadis* settled, and the petition in the Supreme Court withdrawn. Plaintiff requested that the stay be lifted and that the matter be set down to complete the damages inquest. The Court granted Plaintiff's request, entering a referral to Magistrate Judge Dolinger for a damages inquest on February 22, 2007.

On March 9, 2007, Plaintiff Sompo wrote to the Court, asking that the Court So Order the Parties' Stipulation on Damages, and asking that the Court grant Summary Judgment in favor of the Plaintiff for the stipulated amount, plus prejudgment interest. The letter enclosed a Proposed Order on behalf of Plaintiff. On March 13, 2007, the Court entered an Order of Stipulation on Damages, under which the parties agreed that the value of the lost/damaged cargo was $422,246.02.[1]

By letter dated March 22, 2007, Defendant UP objected to entry of the Proposed Order, arguing that it went well beyond the scope of this Court's December 15, 2006 Order of vacatur, which made no new findings of fact or law other than determining that the Second Circuit decision in *Sompo II* was controlling in this action. Instead, Defendant asks the Court to enter merely a Judgement against it, in the amount of stipulated damages, without setting forth any reasoning or findings. (*See e.g.* Def. Letters of March 22, 2007 and March 26, 2007).

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[1] Contrary to Defendant's suggestion, this Order did not include language indicating that "the only thing remaining [in this case is] for the Clerk to enter judgment for this amount plus interest." (Def. Letter of August 15, 2007).

On July 30, 2007, Plaintiff again wrote to the Court, enclosing a copy of the District Court's summary judgment ruling on remand from *Sompo II*. In that decision, Judge McMahon found that, on facts quite similar to those at issue in this action, that UP did not have a limit of liability for damage occurring during the rail portion of an international shipment under an intermodal bill of lading. *Sompo Japan Insurance Company v. Union Pacific Railroad Company*, 2007 WL 2230091 (S.D.N.Y.2007). Plaintiff suggests that the Court adopt Judge McMahon's reasoning and enter summary judgment in Plaintiff's favor. (Pl. Letter of July 30, 2007).

In response, by letter dated August 15, 2007, Defendant UP objects to Plaintiff's suggestion. Curiously, Defendant does not contest Sompo's suggestion that summary judgment should be entered in Plaintiff's favor; however, Defendant does object to the Court adopting Judge McMahon's reasoning. Although the parties and exempt rail circulars in this case and in the case before Judge McMahon were identical, Defendant argues that the cases are factually distinct because they involve different ocean carriers, different bills of lading, electronic waybills and exempt transport agreements. (Def. Letter of August 15, 2007). In a reply dated August 16, 2007, Plaintiff Sompo reiterates that the factual distinctions highlighted by Defendant are not material, and that, in this case, there can be no limitation on liability.

B. Factual Background

The undisputed material facts in this action were thoroughly detailed in this Court's original Order of Summary Judgment. (Order of November 21, 2007, at 1-4). The Court presumes the Parties' familiarity with

these facts. Here the Court only summarily reviews the facts most relevant to the instant action.

All portions of the carriage of digital cameras at issue in this action were part of an international shipment. (Complaint ¶ 8). This shipment originated in Tokyo, Japan. (Def.'s Rule 56.1 Stmt ¶ 2). The cargo was discharged from the M/V Hudson Bridge ship in Tacoma, Washington for interstate transport by UP rail delivery to Woodbury, New York. (Def.'s Rule 56.1 Stmt ¶¶ 1-2; Pls.' Response to Def.'s Rule 56.1 Stmt ¶¶ 1-2). The shipment traveled under a through bill of lading ("B/L"). (Order of November 21, 2007, at n.1 and n.2). This through B/L extended liability provisions of the United States Carriage of Goods by Sea Act (COGSA), stating that if COGSA applies, the carrier shall be liable for up to $500.00 per package, "unless the nature and value of such Goods have been declared by the shipper before receipt of Goods by Carrier and inserted into this Bill of Lading." (Sheldon Aff. Ex. A).

The inland rail transport was further governed by two additional documents; an Exempt Rail Transport Agreement that UP entered into with K-Line and Rail Bridge Corporation, and an EDI waybill which UP issued to Rail Bridge. (Def.'s Rule 56.1 Stmt ¶¶ 10-11). The Exempt Rail Transport Agreement states, in pertinent part, "Liability for freight loss and damage to lading while under the control of UP shall be governed by applicable rules circulars." (Sheldon Aff. ¶ 15). The EDI waybill does not cite the rules circulars, and it miscites the Exempt Rail Transport Agreement contract number. (Sheldon Aff. Ex. C).

According to Defendant, the applicable Rules Circular for this shipment is UP Exempt Circular 20-B,

which limits liability for damages to $500.00 per package, pursuant to COGSA, 46 U.S.C. § 1304(5). (Sheldon Aff. ¶¶ 16-17). Also, according to Defendant, Item 143-B of the Rules Circular offers full value Carmack liability by explaining:

> 49 U.S.C. Section 11706 [the Carmack Amendment] provides for full value and other liability terms for the carrier and the shipper. To make a shipment pursuant to the terms of 49 U.S.C. Section 11706, the 7.[sic] must comply with the following provisions ...

(Sheldon Aff. ¶ 22 and Ex. F). Plaintiffs do not dispute the accuracy of the Item 143-B writing. However, Plaintiffs allege that Olympus America was never presented with Circular 20-B and its option of declaring Carmack liability. (Pls.' Response to Def.'s Rule 56.1 Stmt ¶ 20). While Item 143-B explains the requirements for making a shipment pursuant to Carmack, Item 142-B(1) sets out the "General Application" for Cargo Loss and Damage Provisions. (Sheldon Aff. Ex. E). The only term among these provisions which informs shippers of their option to choose liability under Carmack is Item 142-B(1)(C). *Id.* That term reads, in relevant part: "On domestic moves that originate in the United States, Shippers may, at their option, select the liability provisions set forth in 49 U.S.C. Section 11706 (Carmack) as explained in Item 143." *Id.*

II. *DISCUSSION*

A. *The Summary Judgment Standard*

A district court should grant summary judgment when there is "no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see also Hermes*

Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 107 (2d Cir.2000). Genuine issues of material fact cannot be created by mere conclusory allegations; summary judgment is appropriate only when, "after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party." *Heublein v. United States*, 996 F.2d 1455, 1461 (2d Cir.1993) (*citing Matsushita Elec. Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

In assessing when summary judgment should be granted, "there must be more than a 'scintilla of evidence' in the non-movant's favor; there must be evidence upon which a fact-finder could reasonably find for the non-movant." *Id.* (*citing Anderson v.. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). While a court must always "resolv[e] ambiguities and draw[] reasonable inferences against the moving party," *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986) (*citing Anderson*), the non-movant may not rely upon "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Id.* at 12. Instead, when the moving party has documented particular facts in the record, "the opposing party must 'set forth specific facts showing that there is a genuine issue for trial.' " *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir.1986) (*quoting* Fed.R.Civ.P. 56(e)). Establishing such facts requires going beyond the allegations of the pleadings, as the moment has arrived " 'to put up or shut up.' " *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir.2000) (citation omitted). Unsupported allegations

in the pleadings thus cannot create a material issue of fact. *Id.*

B. *Carmack Liability*

At the outset, the Court notes that it is true, as Defendant observes in its March 22, 2007 letter to the Court, that the Court made no specific findings in its Order of vacatur. However, it is not true that the Court has not made findings of fact or law in the long history of this case. The Court's original ruling on summary judgment necessarily made numerous findings, and only one of these, that the Carmack Amendment and Staggers Act requirements were inapplicable to this case, was overruled by the Second Circuit. Among the other determinations that the Court made in this case, the Court found, as the parties largely conceded, that the cargo at issue in this case was burglarized during the domestic rail portion of an international shipment traveling under a through bill of lading that extended COGSA liability provisions to subcontractors, including domestic carriers. (Order of November 21, 2007, at 1-4).

Accordingly, it is clear to the Court that the Circuit Court's ruling precludes any argument that Carmack does not apply to this action. As the Circuit Court unambiguously ruled:

> ... [W]e have determined that Carmack applies to the domestic rail portion of an international shipment originating in a foreign country and traveling under a through bill of lading, even where the parties have extended COGSA's liability provisions to domestic rail carriers ..."

Sompo II, 456 F.3d at 75. Because the Court has already determined that the background of this case precisely mirrors these circumstances, Defendant

cannot now contest the applicability of Carmack. *See also, Sompo Japan Insurance Company v. Union Pacific R. Co.*, 2007 WL 2230091, *4 (S.D.N.Y, 2007) (finding, on facts analogous to the case at bar, that the Second Circuit ruling in *Sompo II* is detminative and precludes any argument that Carmack does not govern).

C. *Compliance with Carmack*

In *Sompo II*, the Court remanded the action to the District Court for consideration of arguments that Defendant complied with the requirements of Carmack and Staggers. *Sompo II* citation. Because Carmack applies in this action, on summary judgment this Court must determine likewise whether Defendant complied with Carmack in the instant case. The issue of compliance with Carmack was originally briefed in the parties' moving papers but, having concluded that Carmack was inapplicable, the Court declined to consider the parties' arguments. The Court considers these arguments now.

Aside from its argument that the K-Line B/L satisfied Carmack because it offered alternate rates under COGSA, Defendant Sompo offers two reasons why it complied with Carmack. First Defendant argues that the shipper could have requested full value Carmack liability in the K-Line B/L. (Def. Mem. Law at 6). Second, Defendant argues that it complied with Carmack because the UP Exempt Circular 20-B offered alternate rates for full liability under item 143-B. (Def. Mem. Law at 5).

The Court turns to UP's argument that Clause 4 of the B/L complied with Carmack. According to UP, the shipper had an opportunity to avoid the $500.00 per package limitation because clause 4 of the B/L states,

in relevant part, that if COGSA applies, the carrier will not be liable for damage in an amount exceeding $500.00 per package, "unless the nature and value of such goods have been declared by the shipper before receipt of such goods and inserted in this bill of lading." (Def. Mem. Of Law at 5; Sheldon Aff. Ex. A). Defendant essentially argues that if the shipper wanted full value liability under Carmack, the B/L put the shipper on notice that all it had to do was ask.

Well-settled law and the Circuit Court's ruling in *Sompo II* foreclose this argument. It is established that the burden to offer full Carmack liability is on the rail carrier. *See Tokio Marine and Fire Ins. Co., Ltd. v. Amato Motors, Inc.*, 996 F.2d 874, 879 (7th Cir.1993) ("rail carriers still must offer full value rates"). Moreover, the Court in Sompo II found that bills of lading which offer full coverage under COGSA alone cannot satisfy the Staggers Act.

As the Second Circuit explains, COGSA and Carmack respectively rely on negligence and strict liability regimes. *Sompo II*, 456 at 76. A bill of lading which offers alternative terms solely under COGSA does not comply with Carmack: "[T]he Court cannot assume a shipper was properly given the opportunity to choose among types of liability coverage and chose not to pay higher rates for full coverage under a strict liability regime." *Id.* As the Second Circuit makes clear, "[r]ail carriers that wish to limit their liability must offer the shipper the option of full Carmack coverage, which includes both the Carmack version of strict liability and full coverage for loss." *Sompo II*, 456 at 60.

For purposes of assessing whether clause 4 of the K-line B/L offered full Carmack coverage, its language

cannot be relevantly distinguished from the B/L at issue in *Sompo II*. There, the operable B/L provided that, if COGSA applies, neither the carrier nor the vessel will not be liable for damage in an amount exceeding $500.00 per package, "unless the value of the Goods has been declared and inserted in the declared value box on the face hereof." *Id.* The K-line B/L in the instant case likewise failed to make mention of the Carmack Amendment's actual full liability terms, and they are never offered as an option for the shipper to choose. Accordingly, Defendant cannot maintain that the K-Line B/L complied with Carmack under the terms of Clause 4.

Defendant's second argument, that UP offered full Carmack coverage under the UP Exempt Circular 20-B, also fails as a matter of law. Defendant argues that Circular 20-B offered alternate rates for full Carmack liability under Item 143-B.[2] (Def. Mem. Law at 5), Section 27 of the Exempt Rail Transport Agreement entered into by Rail Bridge and UP provides that "Liability for freight loss and damage to lading while under the control of UP shall be governed by applicable rules circulars." Defendant maintains that the applicable rules circular here was Circular 20-B, which in turn offered Carmack liability under Item 143-B. *Id.* Plaintiffs dispute whether the Exempt Rail Transport Agreement and Circular 20-B are binding on Plaintiff Olympus, the shipper. (Pl. Mem. Law at 13). Plaintiffs

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[2] UP also argues that because Item 142-B(3)(L) of the Circular recognizes that the shipper may opt for alternative liability rates, it is further evidence of compliance with Carmack. (Def. Mem. Law at 3). However these terms merely refer the shipper to the K-Line B/L, which as described herein, cannot alone satisfy the requirements of Carmack and the Staggers Amendment.

further disputes whether the shipper was properly on notice of either of these documents, compellingly arguing that Defendant relies on too many incorporation by reference steps to properly charge the shipper with notice. (Pls.' Mem. Law at 18).

However, even if Plaintiff Olympus were on notice of the Exempt Rail Transport Agreement and Circular 20-B, and these agreements were binding upon the shipper, the Court cannot find that the Circular offered full Carmack liability for this international intermodal shipment. The Circular includes only one term which recognizes a shipper's option to chose full Carmack liability, Item 142-B(1)(C); that term clearly limits the availability of this option to "domestic moves that originate in the United States." (Sheldon Aff. Ex. E). Accordingly, even assuming that the shipper was on notice of the terms of the Exempt Rail Transport Agreement and Circular 20-B, Defendant failed to offer Plaintiff Olympus full Carmack liability for their international shipment. *See also, Sompo Japan Insurance Company v. Union Pacific R. Co.*, 2007 WL 2230091, *5 (S.D.N.Y.2007) (considering the same Rules Circular language and finding that it limited the offer of Carmack liability to domestic shipments).

III. *CONCLUSION*

For the foregoing reasons, the Court DENIES Defendant's partial motion for summary judgment seeking to limit Defendant's liability for stolen goods to $500.00 per package.

Liability in this action is not contested and the parties have stipulated to actual damages. Accordingly, the Clerk of Court is hereby directed to enter judgment in the amount of $422,246.02, plus prejudgment interest at the rate of 9% from November

29, 2001 until the date of entry of this judgment, in favor of Plaintiffs and against Defendant.

The Clerk of Court is also directed to close this case.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of October, two thousand nine.

UNITED STATES OF APPEALS
FILED
OCT -6 2009
Catherine O'Hagan Wolfe,
CLERK
SECOND CIRCUIT

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, and OLYMPUS AMERICA, INC.,

Plaintiffs-Appellants-Cross Appellees,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellee-Cross-Appellant.

NORFOLK SOUTHERN RAILROAD COMPANY,

Defendant.

Nos. 05-7039-cv(L)*
07-4739-cv(XAP)

* 05-7039-cv(Lead) is disposed of by stipulation filed December 5, 2007.

Union Pacific Railroad Company having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
By: s/Franklin Perez
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of October, two thousand nine.

UNITED STATES OF APPEALS
FILED
OCT -6 2009
Catherine O'Hagan Wolfe,
CLERK
SECOND CIRCUIT

SOMPO JAPAN INSURANCE COMPANY OF AMERICA,
Plaintiff-Appellee,

v.

No. 07-5190-cv

UNION PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

Union Pacific Railroad Company having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
By:s/Franklin Perez
Frank Perez, Deputy Clerk

Carriage of Goods by Sea Act
46 U.S.C.A. §30701 Notes

"Bills of lading subject to chapter [note]

"Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter [this note].

"Sec. 1. Definitions

"When used in this chapter [this note]—

"(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

"(b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

"(c) The term 'goods' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

"(d) The term 'ship' means any vessel used for the carriage of goods by sea.

"(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

"Sec. 2. Duties and rights of carrier

"Subject to the provisions of section 1306 of this title [section 6 of this note], under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title [sections 3 and 4 of this note].

"Sec. 3. Responsibilities and liabilities of carrier and ship

"(1) Seaworthiness

"The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship;

"(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

"(2) Cargo

"The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

"(3) Contents of bill

"After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

"(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown

clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

"(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

"(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

"(4) Bill as prima facie evidence

"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter [this note] shall be construed as repealing or limiting the application of any part of chapter 801 of Title 49.

"(5) Guaranty of statements

"The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

"(6) Notice of loss or damage; limitation of actions

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

"Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

"The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided,* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

"In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"(7) 'Shipped' bill of lading

"After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to

the shipper shall, if the shipper so demands, be a 'shipped' bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a 'shipped' bill of lading.

"(8) Limitation of liability for negligence

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter [this note], shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

[In par. (4), "chapter 801 of title 49" substituted for "the Act of August 29, 1916, commonly known as the 'Pomerene Bills of Lading Act' [49 App. U.S.C.A. § 81 et seq.]" on authority of Pub.L. 103-272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Tile 49, Transportation.]

"Sec. 4. Rights and immunities of carrier and ship

"(1) Unseaworthiness

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence

on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title [section 3 of this note]. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

"(2) Uncontrollable causes of loss

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"**(a)** Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

"**(b)** Fire, unless caused by the actual fault or privity of the carrier;

"**(c)** Perils, dangers, and accidents of the sea or other navigable waters;

"**(d)** Act of God;

"**(e)** Act of war;

"**(f)** Act of public enemies;

"**(g)** Arrest or restraint of princes, rulers, or people, or seizure under legal process;

"**(h)** Quarantine restrictions;

"**(i)** Act or omission of the shipper or owner of the goods, his agent or representative;

"**(j)** Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general:

Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

"**(k)** Riots and civil commotions;

"**(l)** Saving or attempting to save life or property at sea;

"**(m)** Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

"**(n)** Insufficiency of packing;

"**(o)** Insufficiency or inadequacy of marks;

"**(p)** Latent defects not discoverable by due diligence; and

"**(q)** Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

"**(3) Freedom from negligence**

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

"**(4) Deviations**

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter [this note] or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the

deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

"(5) Amount of liability; valuation of cargo

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

"(6) Inflammable, explosive, or dangerous cargo

"Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before

discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

"Sec. 5. Surrender of rights; increase of liabilities; charter parties; general average

"A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter [this note], provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

"The provisions of this chapter [this note] shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter [this note]. Nothing in this chapter [this note] shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

"Sec. 6. Special agreement as to particular goods

"Notwithstanding the provisions of sections 1303 to 1305 of this title [sections 3 to 5 of this note], a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such

goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

"Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

"Sec. 7. Agreement as to liability prior to loading or after discharge

"Nothing contained in this chapter [this note] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

"Sec. 8. Rights and liabilities under other provisions

"The provisions of this chapter [this note] shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the

provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

"Sec. 9. Discrimination between competing shippers

"Nothing contained in this chapter [this note] shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter [this note]; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title [section 5 of this note]; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

"Sec. 10. [Formerly set out as 49 App. U.S.C.A. § 25, and repealed by Sept. 18, 1940, c. 722, T. I, § 14(a), 54 Stat. 919.]

"Sec. 11. Weight of bulk cargo

"Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter [this note], the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

"Sec. 12. Liabilities before loading and after discharge; effect on other laws

"Nothing in this chapter [this note] shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter [this note], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

"Sec. 13. Scope of chapter [note]; 'United States'; 'foreign trade'

"This chapter [this note] shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter [this note] the term 'United States' includes its districts, territories, and possessions. The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter [this note] shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter [this note], shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter [this note]: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it

shall have effect subject to the provisions of this chapter [this note].

[A proviso in second sentence that the Philippine Legislature might by law exclude its application to transportation to or from ports of the Philippine Islands was omitted in view of Proc. No. 2695, set out as a note under § 1394 of Title 22, Foreign Relations and Intercourse, which proclaimed the independence of the Philippines.]

"Sec. 14. Suspension of provisions by President

"Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title [sections 1 to 8 of this note], or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

"Any contract for the carriage of goods by sea, subject to the provisions of this chapter [this note], effective during any period when sections 1301 to 1308 of this title [sections 1 to 8 of this note], or any part thereof, are suspended, shall be subject to all provisions

of law now or hereafter applicable to that part of said sections which may have thus been suspended.

"Sec. 15. Effective date; retroactive effect

"This chapter [this note] shall take effect ninety days after April 16, 1936; but nothing in this chapter [this note] shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

"Sec. 16. Short title

"This chapter [this note] may be cited as the 'Carriage of Goods by Sea Act.'"

49 U.S.C.A. §10501 (2009)

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

* * *

49 U.S.C. §10502 (2000)

§ 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section

is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

49 U.S.C. §10709 (2000)

§ 10709. Contracts

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28, United States Code.

(d)(1) A summary of each contract for the transportation of agricultural products (including grain, as defined in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and products thereof) entered into under this section shall be filed with the Board, containing such nonconfidential information as the Board prescribes. The Board shall publish special

rules for such contracts in order to ensure that the essential terms of the contract are available to the general public.

(2) Documents, papers, and records (and any copies thereof) relating to a contract described in subsection (a) shall not be subject to the mandatory disclosure requirements of section 552 of title 5.

(e) Any lawful contract between a rail carrier and one or more purchasers of rail service that was in effect on October 1, 1980, shall be considered a contract authorized by this section.

(f) A rail carrier that enters into a contract as authorized by this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract.

(g)(1) No later than 30 days after the date of filing of a summary of a contract under this section, the Board may, on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

(2)(A) A complaint may be filed under this subsection—

(i) by a shipper on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

(B) In addition to the grounds for a complaint described in subparagraph (A) of this paragraph, a complaint may be filed by a shipper of agricultural commodities on the grounds that such shipper individually will be harmed because—

(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

(ii) the proposed contract constitutes a destructive competitive practice under this part.

In making a determination under clause (ii) of this subparagraph, the Board shall consider the difference between contract rates and published single car rates.

(C) For purposes of this paragraph, the term "unreasonable discrimination" has the same meaning as such term has under section 10741 of this title.

(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Board may establish, the Board shall determine whether the contract that is the subject of such proceeding is in violation of this section.

(B) If the Board determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect

to a rail carrier, the Board shall, subject to the provisions of this section, order such rail carrier to provide rates and service substantially similar to the contract at issue with such differentials in terms and conditions as are justified by the evidence.

(h)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products, but not including wood pulp, wood chips, pulpwood or paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC).

(2) The Board may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Board considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

(3)(A) This subsection shall cease to be effective after September 30, 1998.

(B) Before October 1, 1997, the National Grain Car Council and the Railroad-Shipper Transportation Advisory Council shall make recommendations to Congress on whether to extend the effectiveness of or otherwise modify this subsection.

49 U.S.C. §11706 (2000)

§ 11706. Liability of rail carriers under receipts and bills of lading

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

(b) The rail carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering

the property for which the receipt or bill of lading was issued is entitled to recover from the rail carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.

(2) A rail carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on trains carrying passengers.

(3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which—

(A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or

(B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

(d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.

(2)(A) A civil action under this section may only be brought—

(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(B) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person

written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection—

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

49 U.S.C. §14706 (2000)

§ 14706. Liability of carriers under receipts and bills of lading

(a) GENERAL LIABILITY.—

(1) MOTOR CARRIERS AND FREIGHT FORWARDERS.—A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) FREIGHT FORWARDER.—A freight forwarder is both the receiving and delivering

carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) APPORTIONMENT.—The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c) SPECIAL RULES.—

(1) MOTOR CARRIERS.—

(A) SHIPPER WAIVER.—Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section

13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) CARRIER NOTIFICATION.—If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

(C) PROHIBITION AGAINST COLLECTIVE ESTABLISHMENT.—No discussion, consideration, or approval as to rules to limit liability under this subsection may be undertaken by carriers acting under an agreement approved pursuant to section 13703.

(2) WATER CARRIERS.—If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the

water carrier.

(d) CIVIL ACTIONS.—

(1) AGAINST DELIVERING CARRIER.—A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.

(2) AGAINST CARRIER RESPONSIBLE FOR LOSS.—A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(3) JURISDICTION OF COURTS.—A civil action under this section may be brought in a United States district court or in a State court.

(4) JUDICIAL DISTRICT DEFINED.—In this section, "judicial district" means—

(A) in the case of a United States district court, a judicial district of the United States; and

(B) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) MINIMUM PERIOD FOR FILING CLAIMS.—

(1) IN GENERAL.—A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice

that the carrier has disallowed any part of the claim specified in the notice.

(2) SPECIAL RULES.—For the purposes of this subsection—

(A) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(B) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(f) LIMITING LIABILITY OF HOUSEHOLD GOODS CARRIERS TO DECLARED VALUE.—A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

(g) MODIFICATIONS AND REFORMS.—

(1) STUDY.—The Secretary shall conduct a study to determine whether any modifications or reforms should be made to the loss and damage provisions of this section, including those related to limitation of liability by carriers.

(2) FACTORS TO CONSIDER.—In conducting the study, the Secretary, at a minimum, shall consider—

(A) the efficient delivery of transportation services;

(B) international and intermodal harmony;

(C) the public interest; and

(D) the interest of carriers and shippers.

(3) REPORT.—Not later than 12 months after January 1, 1996, the Secretary shall submit to Congress a report on the results of the study, together with any recommendations of the Secretary (including legislative recommendations) for implementing modifications or reforms identified by the Secretary as being appropriate.

Pub. L. No. 96-448, §10713
94 Stat. 1895 (1980)

An Act
To reform the economic regulation of railroads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Staggers Rail Act of 1980".

* * *

CONTRACTS

Sec. 208. (a) Subchapter I of chapter 107 of title 49, United States Code, as amended by this Act, is further amended by adding at the end thereof the following new section:

§ 10713. Contracts

"(a) One or more rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions. Such a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.

"(b) Each contract entered into under this section shall be filed with the Commission, together with a summary of the contract containing such

nonconfidential information as the Commission prescribes. The Commission shall publish special tariff rules for such contracts in order to assure that the essential terms of the contract are available to the general public in tariff format.

"(c) A contract filed under this section shall be approved by the Commission, as provided in subsection (e) of this section, unless the Commission determines in a proceeding under subsection (d) of this section that such contract is in violation of this section.

"(d)(1) No later than 30 days after the date of filing of a contract under this section, the Commission may, on its own initiative or on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

"(2)(A) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed—

"(i) by a shipper only on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

"(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

"(B) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds

for a complaint described in subparagraph (A) of this paragraph, a complaint may be filed by a shipper on the grounds that such shipper individually will be harmed because—

"(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

"(ii) the proposed contract constitutes a destructive competitive practice under this subtitle.

In making a determination under clause (ii) of this subparagraph, the Commission shall consider the difference between contract rates and published single car rates.

"(C) For purposes of this paragraph, the term 'unreasonable discrimination' has the same meaning as such term has under section 10741 of this title.

"(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Commission may establish, the Commission shall determine whether the contract that is the subject of such proceeding is in violation of this section.

"(B) If the Commission determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect

to a carrier, the Commission shall, subject to the provisions of this section, order such carrier to provide rates and service substantially similar to the contract at issue with such differentials in terms and conditions as are justified by the evidence.

"(e) Approval of a contract filed under this section shall be effective—

"(1) on the date the Commission expressly approves such contract, but in no event before the end of the 30-day period beginning on the date such contract is filed or after the end of the 60-day period beginning on such date; or

"(2) if the Commission has not disapproved such contract by the end of the 60-day period beginning on the date such contract is filed, at the end of such 60-day period.

"(f) The Commission may limit the right of a rail carrier to enter into future contracts under this section following a determination that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under section 11101 of this title.

"(g) The Commission may not require a rail carrier to violate the terms of a contract that has been approved under this section, except to the extent necessary to comply with section 11128 of this title.

"(h) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

"(i)(1) A contract that is approved by the Commission under this section, and transportation

under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or in any court on the grounds that such contract violates a provision of this subtitle.

"(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

"(j) The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. Nothing in this section shall affect the rights of the parties to challenge the existence of such a contract.

"(k)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products and paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC), except that in the case of a proposed contract between a class I carrier and a shipper originating an average of 1,000 cars or more per year during the prior 3-year period by major car type on a particular carrier, not more than 40 percent of carrier owned or leased equipment utilized on the average during the prior 3- year period may be

used for such contract without prior authorization by the Commission.

"(2) The Commission may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Commission considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

"(l) Service under a contract approved under this section shall be deemed to be a separate and distinct class of service, and the equipment used in the fulfillment of such a contract shall not be subject to car service decisions under section 11123 of this title.

"(m) The Commission shall establish a railroad contract rate advisory service. The advisory service shall—

"(1) compile and disseminate to interested parties nonconfidential summaries of the provisions of individual contract information relating to the provisions of contracts entered into under this section with regard to various goods, items, and commodities covered by such contracts;

"(2) provide the Commission and interested parties with advice regarding contracts; and

"(3) assess the impact on competition among shippers of variations between contract rates for various shipments and the published single car rates, and submit a report on such impact to the Congress not later than 90 days after the effective date of the Staggers Rail Act of 1980.".

(b) The section analysis for chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10712, as added by this Act, the following new item:

* * *

Pub. L. No. 96-448, §10505
94 Stat. 1912 (1980)

EXEMPTION

Sec. 213. Section 10505 of title 49, United States Code, is amended to read as follows:

§ 10505. Authority to exempt rail carrier transportation

* * *

"(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

* * *

An Act to Regulate Commerce, ch. 3591, 34 Stat. 584 (1906)

CHAP. 3591.—An Act To amend an Act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, be amended so as to read as follows:

"SEC. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the

United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

* * *

[34 Stat. 593 (1906)]

SEC. 7. That section twenty of said Act be amended so as to read as follows:

"SEC. 20. . . . .

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of

any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

* * *

An Act to Regulate Commerce, ch. 176, 38 Stat. 1196 (1915)

CHAP. 176.—An Act To amend an Act entitled "An act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six.

Be it enacted by the Senate and House of Representatives of the Untied States of America in Congress assembled, That so much of section seven of an Act entitled "An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six, as reads as follows, to wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under

existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines

such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor

filing of claim shall be required as a condition precedent to recovery."

SEC. 2. That this Act shall take effect and be in force from ninety days after its passage.

Approved, March 4, 1915.

49 U.S.C. §1 (1976)

§ 1. Regulation in general; car service; alteration of line

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in–

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

* * *

49 U.S.C. §20 (1976)

* * *

(11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful

holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to

establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when

notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

* * *

Pub. L. No. 95-473, §11707
92 Stat. 1453 (1978)

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the

jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

* * *

[92 Stat. 1466 (1978)]

LEGISLATIVE PURPOSE AND CONSTRUCTION

Sec. 3. (a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are

considered as superseding it to the extent of the inconsistency.

(b) A reference to a law replaced by sections 1 and 2 of this Act, including a reference in a regulation, order, or other law, is deemed to refer to the corresponding provision enacted by this Act.

(c) An order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

(e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.

(f) If a provision enacted by this Act is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.

Pub. L. No. 95-473, §10501
92 Stat. 1359 (1978)

An Act

To revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code, "Transportation".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted as title 49, United States Code, "Transportation", as follows:

TITLE 49-TRANSPORTATION

* * *

SUBCHAPTER I-RAIL, RAIL-WATER, EXPRESS, AND PIPELINE CARRIER TRANSPORTATION

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control,

management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

* * *

49 C.F.R. §1090.2

§ 1090.2 Exemption of rail and highway TOFC/COFC service.

Except as provided in 49 U.S.C. 10505 (e) and (g), 109229(1), and 10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

Supreme Court, U.S.
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No. 09-787

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA AND OLYMPUS AMERICA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Sompo Japan Insurance, Inc. (traded on the Tokyo Stock Exchange) is the parent corporation of, and owns more than 10% of the stock in, respondent Sompo Japan Insurance Company of America, Inc.

Olympus Corporation (traded on the Tokyo Stock Exchange) is the parent corporation of, and owns more than 10% of the stock in, respondent Olympus America, Inc.

No other publicly traded corporation owns 10% or more of the stock of either Respondent.

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STATEMENT

Petitioner devotes over fourteen pages to describing the facts of a case that it tries to characterize (at 2) as "essentially identical to" or (at 9) "nearly identical to" *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* (No. 08-1553) and *Union Pacific Railroad Co. v. Regal-Beloit Corp.* (No. 08-1554) — the *Regal-Beloit* cases — now pending before this Court. The two cases at issue here, however, present a remarkably different scenario than the *Regal-Beloit* cases. Despite petitioner's lengthy statement, the railroad has conveniently omitted any discussion of the fact that separate bills of lading were issued for the inland carriage in both of the present cases. In *Regal-Beloit* and elsewhere, petitioner has consistently argued that a separate bill of lading is the key to triggering the application of the Carmack Amendment in the multimodal context. Thus the legal issues here have no connection to the legal issues now pending in *Regal-Beloit*. Even under petitioner's analysis, the decision below should be affirmed.

1. In *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, No. 07-5190-cv, Kubota Tractor Corporation contracted with ocean carrier Mitsui OSK Line Ltd. ("MOL") to ship thirty-two tractors from Tokyo to Georgia. Pet.App.6a. Under this contract, MOL issued three through bills of lading. Pet.App.6a. MOL contracted with CSX Intermodal ("CSXI") to arrange inland transportation from Los Angeles to Georgia. CSXI, in turn, sub-contracted with petitioner to provide transportation by rail for that leg of the journey. Pet.App.70a-71a. Under that sub-contract, petitioner issued three electronic waybills —non-negotiable bills

of lading, *see* 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-11 (4th ed. 2006) — for the inland-rail transportation that were separate from the through bills of lading that MOL had issued. Pet.App.71a.

Petitioner's train derailed in Texas, destroying the shipment of tractors. Kubota recovered the full value of its loss from its insurer, respondent Sompo. Exercising its subrogation rights, Sompo brought suit against petitioner in the Southern District of New York. Pet.App.7a. The district court permitted petitioner to limits its liability to a small fraction of the damage that it had caused, Pet.App.8a-12a, but in the first appeal the Second Circuit reversed. It held that the Carmack Amendment applies to the inland rail leg of an international multimodal shipment and that petitioner was not entitled to limit its liability under the Carmack Amendment. Pet.App.22a-26a.

The Second Circuit remanded the case to determine whether petitioner had successfully contracted out of Carmack coverage. Pet.App.66a. On remand, the district court found, among other facts, that when CSXI subcontracted with petitioner, it had issued three electronic waybills for the inland-rail transportation that were separate from the through bills of lading that MOL had issued. Pet.App.71a.

2. In *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, Nos. 05-7039-cv(L), 07-4739(XAP), Olympus Optical Co. contracted with ocean carrier Kawasaki Kisen Kaisha ("K-Line") to transport four containers of digital cameras from Tokyo to New York. Pet.App.14a. Under that contract, K-Line issued a through bill of

lading. Pet.App.14a-15a. The inland transportation was arranged by RailBridge Corporation, Pet.App.16a, which sub-contracted with petitioner for rail carriage. Under that sub-contract, petitioner issued an EDI waybill (a form of bill of lading) to RailBridge for the inland-rail transportation. That inland waybill was separate from the through bill issued by K-Line. Pet.App.16a.

One of the containers was burglarized during the inland transportation. Pet.App.16a. Respondent Sompo, having insured the shipment and paid the claim, asserted its subrogation rights and filed suit against petitioner in the Southern District of New York. Pet.App.14a. The district court, following the Second Circuit's decision on the first appeal in the companion case here, held that petitioner was not entitled to limit its liability under the governing Carmack Amendment.

3. Petitioner filed a motion to consolidate the two cases in the court of appeals. The Second Circuit denied that motion but agreed to treat the cases as related and submitted them to the same merits panel — a panel over which then-Judge Sotomayor presided. On the merits, the Second Circuit followed its earlier decision and affirmed both district court decisions. Pet.App.1a-4a.

4. In *Regal-Beloit*,[1] four shipments are at issue. Because of the procedural posture in that case (on a motion to dismiss before any discovery could be taken), it has not yet been established whether petitioner issued separate bills of lading for those rail journeys. Under the Ninth Circuit's analysis, it does not matter. The

[1] Petitioner here is also a petitioner in *Regal-Beloit*.

Carmack Amendment applies in any event. But petitioner, arguing that the Carmack Amendment should not apply because no separate bills of lading were issued, recognizes that the Carmack Amendment should apply when separate bills of lading have been issued. Thus the most that petitioner should be able to achieve in *Regal-Beloit* is a remand to determine whether separate bills of lading were issued in those shipments. That is, in the event this Court in *Regal-Beloit* determines that the Carmack Amendment does not apply to that rail shipment under the through bill of lading, its holding in *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 15 (2004) compels that the case be remanded to determine whether a domestic waybill was issued by the rail carrier, and if so, the effect of its terms. Discovery on that issue was apparently never conducted in *Regal-Beloit* and so the issue could not be fully presented to the District Court. For that reason, in part, the Ninth Circuit remanded the matter, calling it contractually a "factual morass." *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 1002 n.22 (9th Cir. 2009). *See also Sompo Japan Ins. Co. of America v. Union Pac. R.R. Co.*, 456 F.3d 54, 76 (2d Cir. 2006) (remanding case to determine, *inter alia*, whether Carmack was offered via the rail carrier's domestic waybills) Pet.App.65a-66a; on remand *Sompo Japan Ins. Co. of America v. Union Pac. R.R. Co.*, No. 09 Civ. 1604, 2007 WL 2230091, at *5 (S.D.N.Y. 2007) (finding that Union Pacific's domestic rail waybills, while subject to Carmack, did not offer full Carmack liability terms), aff'd 341 Fed. Appx. 707 (2d Cir. 2009). Pet.App.76a-78a.

REASONS FOR DENYING THE PETITION

I. Under The Theory Advanced By Petitioner In The *Regal-Beloit* Cases, The Decisions Below Must Be Affirmed Regardless Of This Court's Decision

Petitioner's only rationale for this Court to show any interest in the present cases is that they are in some sense "identical to" the *Regal-Beloit* cases now pending before this Court. But this Court's disposition of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* (No. 08-1553) and *Union Pacific Railroad Co. v. Regal-Beloit Corp.* (No. 08-1554) will have no effect on the resolution of the dispute here. Despite petitioner's insistence to the contrary, the facts of this case are distinguishable in a crucial way from those in *Regal-Beloit*. As the district courts held in each case, petitioner carried the cargo on the inland rail legs of multimodal journeys under separate bills of lading, not under the through bills issued by ocean carriers MOL and K Line. Pet.App.16a, 71a. This factual difference not only distinguishes the present cases from *Regal-Beloit*, but it also means that the Carmack Amendment covers the cargo at issue here even if this Court were to accept petitioner's own analysis in *Regal-Beloit*.

The issuance of separate bills of lading for the inland legs here precludes petitioner's argument that Carmack cannot apply when cargo is shipped on a through bill of lading. Petitioner relied on the absence of a separate bill of lading in crucial ways in *Regal-Beloit*. It implicitly acknowledged that the Carmack Amendment applies to the inland leg of a multimodal shipment when that leg

is covered by a separate bill of lading. UPRR *Regal-Beloit* Pet. 11, 16, 18-19, 20, 21. And its argument that this Court should reverse the Ninth Circuit in *Regal-Beloit* (because Carmack should not apply to the inland leg of a multimodal shipment) was dependent upon the absence of a separate bill of lading for that leg. UPRR *Regal-Beloit* Pet. 20, 24, 26 n.2, 30, 34, 35-36, 37.

Petitioner described as "well-established" the "rule" in the Fourth, Sixth, Seventh, and Eleventh Circuits that "the Carmack Amendment does not apply to the inland leg of a multimodal shipment under a through bill of lading." UPRR *Regal-Beloit* Pet. 16. Petitioner cited cases in each of these circuits as establishing that the Carmack Amendment does not apply to the cargo on the inland leg of a journey starting in a foreign country unless the domestic segment is covered by a separate bill of lading. *Id.* 18-19 (quoting the Eleventh Circuit's rule in *Altadis USA v. Sea Star Line, LLC*, 458 F.3d 1288, 1294 (11th Cir. 2006)); *id.* 19 (quoting the Seventh Circuit's rule in *Capital Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394 (7th Cir. 1992)); *id.* 20 (quoting the Fourth Circuit's rule in *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703 (4th Cir. 1993)); *id.* (quoting the Sixth Circuit's rule in *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 569 (6th Cir. 2003)).

Petitioner's argument for certiorari in *Regal-Beloit* hinged almost entirely upon the seemingly contrary holdings among circuits as to whether the Carmack Amendment applies to the inland domestic leg of a multimodal journey when no separate bill of lading covers that inland domestic leg. No such question is

presented here, because the district court in each case found the presence of a separate bill of lading that covered the rail leg. *See* Pet.App.71a.

Second, petitioner's argument that this Court should reverse the Ninth Circuit in *Regal-Beloit* depended upon the absence of a separate bill of lading for the inland domestic leg of a multimodal shipment. *See* UPRR *Regal-Beloit* Br. 20. In fact, petitioner described as a "threshold ground" the position that "the Carmack Amendment simply does not apply to an import shipment from a foreign country . . . moving under a through bill of lading" (as opposed to moving under a separate bill of lading for the inland leg). *Id.*; *see also id.* 24, 26 n.2, 30, 34, 35-36.

Indeed, in other litigation petitioner has affirmatively sought the application of the Carmack Amendment with respect to goods carried by an inland carrier as part of an international multimodal shipment when a separate inland bill of lading has been issued. *See, e.g., Union Pacific Railroad Co. v. Greentree Transportation Trucking Co.*, 293 F.3d 120 (3d Cir. 2002).

The presence of separate waybills—equivalent to bills of lading—that covered the domestic leg of the shipments at issue in this case means that the dispute between respondent and petitioner does not present the "identical facts" or same question this Court agreed to review in *Regal-Beloit*.

II. In Any Event, Holding This Case For *Regal-Beloit* Could Interfere With The Court's Consideration Of The *Regal-Beloit* Cases

As the preceding analysis demonstrates, this case is fundamentally different from *Regal-Beloit* and should not be held pending the outcome of *Regal-Beloit*. Even if this Court were to believe that its decision in *Regal-Beloit* would affect the decision here, however, it would still be unwise to hold this case for *Regal-Beloit*. A hold here would suggest that Justice Sotomayor should recuse herself in *Regal-Beloit*, thus preventing a full Court from considering the issues in *Regal-Beloit* (and also creating the possibility of an evenly divided Court).

Because Justice Sotomayor was a member of the Second Circuit panel that heard this case below, she will plainly recuse herself from acting on this case. *See* 28 U.S.C. § 47 ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him."); Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1838 (2003) ("[I]t has been standard practice for a justice to disqualify or recuse himself when encountering a case he or she heard sitting on a lower court.").

If this case were to be held for *Regal-Beloit*, then a decision in *Regal-Beloit* would effectively be a decision in this case, too. Accordingly, Justice Sotomayor's vote in *Regal-Beloit* would effectively be a vote in this case. Because Justice Sotomayor must recuse herself in this case, it would be appropriate for her to similarly recuse herself in *Regal-Beloit* if a decision to hold this case

makes *Regal-Beloit* the vehicle by which this case is effectively decided. In order to avoid unnecessarily diminishing the number of justices available in *Regal-Beloit*, this Court should accordingly deny the petition here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 09-787

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

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v.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In *Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corporation et al.*, Nos. 08-1553 and 08-1554 (consolidated), this Court will decide (*inter alia*) whether the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §11706 (rail carriers), *id.* §14706 (motor carriers), applies at all to the inland rail portion of an international, multimodal import shipment governed by a "through" bill of lading (*i.e.*, a bill of lading that covers the shipment from origin to destination). If this Court determines that Carmack does apply to such shipments, it will clarify the ICA's requirements for contracting out of Carmack. Relying solely on its decision in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006), the Second Circuit held in two related cases that the Carmack Amendment applies to such shipments and that parties may not contract out of Carmack unless terms consistent with Carmack are first offered directly to the overseas shipper.

The question presented is:

Whether the Second Circuit erred by holding, in conflict with other circuits, that the Carmack Amendment displaces the liability terms that the carriers, shippers, and shipping intermediaries agreed would govern these international "through" import shipments.

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INTRODUCTION

In these two related cases (referred to herein as the "*Sompo II* cases") the Second Circuit reaffirmed its holdings in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006) ("*Sompo I*"), that the Carmack Amendment applies to import shipments covered by a through bill of lading and that shipping parties may not opt out of Carmack unless Carmack terms are first offered to the original shipper abroad. Both of those holdings were adopted by the Ninth Circuit in *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985 (9th Cir. 2009), and are currently before this Court in *Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corporation et al.*, Nos. 08-1553 and 08-1554 (consolidated) ("*Regal-Beloit*"). Argument was held on March 24, 2010.

These cases are factually indistinguishable from *Regal-Beloit* and should be held and then resolved in the same manner. Respondents' counter-arguments rest on a misunderstanding of the arguments in *Regal Beloit* and an entirely meritless suggestion that Justice Sotomayor could have a conflict.

ARGUMENT

1. These two cases are factually indistinguishable from *Regal-Beloit*. Both involve cargo loss alleged to have occurred during the inland leg of import shipments moving under a through bill of lading, and rail service contracts between the ocean carrier and Union Pacific that incorporate the same pertinent terms from UP's standard Master Intermodal Transportation Agreement ("MITA").

The only difference is that in *Regal-Beloit* the issue is whether Carmack trumps the forum selection clause in the ocean carrier's bill of lading, whereas these cases

have focused on the Carriage of Goods by Sea Act *liability* limitations incorporated into the bill of lading. That difference would be pertinent only if this Court did not reach the main issues in *Regal-Beloit* and reversed solely on the ground that 49 U.S.C. §10502(e) speaks only of Carmack "terms for liability and claims" but not venue. *See Regal-Beloit* Tr. of Oral Arg. at 39, 41-42; UP *Regal-Beloit* Reply 28. If this Court resolves *Regal-Beloit* any other way, its resolution should be appropriate for these cases as well.

2. Respondents assert that these cases are materially distinguishable from *Regal-Beloit* because here the downstream rail carrier issued "separate bills of lading" for the inland legs of the shipments. Opp. 5. That argument is both legally irrelevant and factually incorrect.

a. Respondents misunderstand the issues in *Regal-Beloit* and the historic nature and significance of a "separate" inland bill of lading. As explained at length in the merits briefs of the parties and the brief of the United States as Amicus Curiae in *Regal-Beloit*, if (as here) a through bill of lading has been issued to the inland destination it does not matter in any way whether additional inland bills of lading are issued. *See, e.g.*, UP *Regal-Beloit* Pet. 32-33; UP *Regal-Beloit* Opening Br. 33-34 & n.6; U.S. *Regal-Beloit* Br. 28-29 & n.11; UP *Regal-Beloit* Reply 14-15. Carmack applies to the inland leg of an import shipment *only* if the ocean bill of lading terminates at the U.S. port of entry. If so, any additional domestic movement is an entirely new shipment originating in the United States, and the first inland U.S. carrier "receives" property for domestic transportation within the meaning of Carmack. *See Reider v. Thompson*, 339 U.S. 113 (1950).

For a century, before and after the 1978 recodification that arguably introduced some ambiguity as to Carmack's reach, the courts and the ICC consistently recognized that Carmack does not apply to the inland leg of *any* import shipment moving under a through bill of lading from a foreign origin to an inland U.S. destination.[1] That settled law was not concerned with whether a downstream carrier issued its own bill of lading. And those historical limitations are still embodied in the current text, in two ways.

First, Carmack is triggered only when a "rail carrier providing transportation or service subject to the jurisdiction of the [STB] ... receives [property] for transportation under this part." 49 U.S.C. §11706(a). Only the first carrier receiving property from the shipper at the point of origin of the shipment "receives" property for transportation within the meaning of Carmack. In a through movement, the first carrier in the United States does not receive property for transportation. If it did, Carmack would *always* have

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[1] *See, e.g., Sklaroff v. Pa. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950); *Strachman v. Palmer*, 82 F. Supp. 161, 153-64 (D. Mass. 1949), *aff'd in relevant part*, 177 F.2d 427 (1st Cir. 1949); *Reider v. Thompson*, 176 F.2d 13, 15 (5th Cir. 1949), *rev'd on other grounds*, 339 U.S. 113 (1950); *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 463-64 (E.D. Pa. 1979); *Condakes v. Smith*, 281 F. Supp. 1014, 1015 (D. Mass. 1968); *Becker & Co. v. Wabash R.R. Co.*, 55 N.W.2d 776, 778-79 (Mich. 1952); *Carr v. Erie Lackawanna R.R. Co.*, 85 Misc. 2d 713, 714 (N.Y. Sup. Ct. 1972); *Leary v. Aero Mayflower Transit Co.*, 207 S.E.2d 781, 788 (N.C. Ct. App. 1974); *Whaling v. Atlas Van Lines, Inc.*, 919 F. Supp. 168, 170 (E.D. Pa. 1996); *Alwine v. Pa. R.R. Co.*, 15 A.2d 507, 508 (Pa. Super. Ct. 1940); *Balt. & Ohio R.R. Co. v. Montgomery & Co.*, 90 S.E. 740, 740-41 (Ga. Ct. App. 1916); *In re Bills of Lading*, 52 I.C.C. 671, 726-29 (1919); *Heated Car Serv. Regulations*, 50 I.C.C. 620, 623-24 (1918); *In re Cummins Amendment*, 33 I.C.C. 682, 693 (1915).

covered the inland leg of import through shipments—even between 1906 and 1915 when Carmack applied only to a carrier "receiving property for transportation from a point in one State to a point in another State,"[2] or from 1915 to 1978 when it applied to carriers "receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country."[3] But as one court explained in 1979, "[t]he cases interpreting the Carmack Amendment have *uniformly* held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States." *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 464 (E.D. Pa. 1979) (emphasis added).

That was firmly settled law, and essential to Carmack's purpose of promoting unified responsibility in the first carrier for the entire voyage, under consistent terms. *See Atl. Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 195-96 (1911). If a mid-stream carrier could be a Carmack "receiving" carrier then the shipper must prove that the midstream carrier received the goods "in good order and condition" and the law governing the damage would depend on where it occurred. *Reider v. Thompson*, 339 U.S. 113, 118 (1950). "Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task, of determining on which of the several connecting lines the damage occurred." *Mo., Kan., &*

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[2] Act of June 29, 1906, ch. 3591, §7, 34 Stat. 584, 595.

[3] Act of March 4, 1915, ch. 176, 38 Stat. 1196, 1197.

Tex. Ry. Co. v. Ward, 244 U.S. 383, 387 (1917). The modern movement of sealed containers by ocean and land makes that problem all the more acute. As this Court recognized in *Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 18-19 (2004), through bills extending COGSA terms inland solve these problems for ocean through shipments in much the same way that Carmack does for purely domestic commerce and exports to Canada and Mexico. But neither Carmack nor COGSA can achieve their intended purpose if they are interpreted to overlap.

Although the present statutory language differs in other ways, it uses the "receives for transportation" language in exactly the same way Carmack always has. Indeed, respondents essentially conceded at argument in *Regal-Beloit* that Union Pacific is not the "receiving" carrier in an import through movement even though it may be the first carrier in the United States. *See Regal-Beloit* Tr. of Oral Arg. at 39; *see also id.* at 20-21 (argument of the United States) (citing *Mexican Light & Power Co. v. Tex. Mexican Ry. Co.*, 331 U.S. 731 (1947); *Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Ry. Co.*, 285 U.S. 127 (1932); *St. Louis, Iron Mountain & S. Ry. Co. v. Starbird*, 243 U.S. 592 (1917); *Ward*, 244 U.S. 383; *Riverside Mills*, 219 U.S. 186). And the present venue provisions confirm that the receiving carrier is the carrier at the point of origin of the shipment, by using the terms "receiving" carrier and "originating" carrier interchangeably, and by providing for venue over that carrier only in the (U.S.) "judicial district in which the point of origin is located." 49 U.S.C. §11706(d).

Second, the historic language limiting Carmack to transportation "in the United States or from a place in

the United States to a place in an adjacent foreign country when transported under a through bill of lading" is still right there in the statute—it just appears at the end of the third sentence of §11706(a). *See* U.S. *Regal-Beloit* Br. 21-23; UP *Regal-Beloit* Reply 10-11. The historic meaning of that language (and the only interpretation that does not render everything after "in the United States" superfluous) is that it excludes the inland leg of any import through shipment and any export through shipment to a non-adjacent foreign country. The indentation that makes that language appear to be a part of subclause (a)(3) was introduced by stylistic changes to the text of the 1995 ICCTA that surely were not intended to change the meaning. *Compare* Pet.App.146a (1978 version) *with* Pet.App.116a (current version). That indentation does not appear in either of the parallel Carmack provisions governing liability of motor carriers and pipeline carriers, respectively. *See* 49 U.S.C. §14706 (Pet.App.120a), *id.* §15906. And reading that clause as modifying only connecting carriers under §11706(a)(3) would produce absurd results. Congress obviously did not intend for Carmack to apply to the inland legs of through shipments in foreign trade but arbitrarily not to segments on connecting lines.[4]

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[4] Assuming, for example, that "in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading" is given its historic meaning, that language would not embrace even a domestic inland leg of an export through shipment bound for a non-adjacent foreign country. If it modifies only subclause (a)(3), then in an export through shipment from Oklahoma to Japan the receiving carrier in the United States would be liable for damage on its own line from Oklahoma to New Mexico, but *not* for damage on a connecting rail segment from New Mexico to California.

Respondents suggest that even if there is an ocean bill of lading extending all the way to the destination, a connecting rail carrier in the United States could break the chain of transportation and transform itself into a Carmack "receiving" carrier by issuing a separate bill of lading. That misconception is drawn from imprecise language used in *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987), and quoted in several other recent cases. But Carmack is not triggered by issuance of a bill of lading. Carmack is triggered when a carrier meeting its requirements receives property for transportation. That carrier is *then* obliged to issue a bill of lading. This Court has always held that once a Carmack through bill has been issued any duplicative downstream bills of lading that might be issued are irrelevant and void—proving that a bill of lading *evidences* Carmack obligations, it does not *create* them. *See Mexican Light & Power*, 331 U.S. at 733-34; *Ward*, 244 U.S. at 387; U.S. *Regal-Beloit* Br. 28 & n.11.

Carmack applies when it applies, and is not affected by whether downstream carriers exchange slips of paper that Carmack does not require or care about. Respondents' suggestion that a remand is necessary here to inquire into whether Union Pacific's "domestic waybills" constitute "bills of lading" illustrates the absurdity of their position. Downstream carriers have to exchange *something* to acknowledge the transfer of goods, where they are going, and the contractual terms under which they are moving. UP generally sends

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Reading that language to constrain all of the obligations imposed by Carmack, as it did historically, makes clear that Carmack does not apply at all to commerce with non-adjacent countries.

electronic waybills—which are not bills of lading but essentially just emails to the carrier from which UP has accepted the shipment for connecting movement. But the statute provides no guidance about whether a particular notification or confirmation document is a "bill of lading" or something else. Carmack does not draw a rigid distinction between bills of lading and other documentation; it requires a "receipt or bill of lading" from the receiving carrier but is ultimately indifferent as to the form of that document or even whether it is issued at all. *See* 49 U.S.C. §11706(a) ("Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier.").

b. In any event, the courts below did *not* find that separate bills of lading were issued for the inland legs. *Contra* Opp. 5. Judge Batts found that the only bill of lading governing each shipment was the through bill of lading issued by "K"-Line. *See* Pet.App.18a-20a. Similarly, Judge Duffy found that "through bills of lading were issued by MOL to Kubota covering the entire shipment from Tokyo to Georgia" and recognized that any inland bill could have no effect on whether Carmack applies. Pet.App.6a. On remand after *Sompo I*, Judge McMahon then held that the Second Circuit's holding concerning the applicability of Carmack was law of the case and therefore did not consider this issue. *See* Pet.App.74a.

Respondents do not and cannot dispute that a through bill governs the import shipments at issue in the *Sompo II* cases. A holding in *Regal-Beloit* that Carmack does not apply to through shipments originating in a nonadjacent foreign country would therefore require reversal here too. As explained above, UP's domestic waybills could not change that

result even if they *were* bills of lading (although they are not).

c. Finally, respondents' proposed distinction will be irrelevant if this Court concludes in *Regal-Beloit* that UP can contract out of Carmack because the MITA is a contract under 49 U.S.C. §10709, or because Carmack-compliant terms were effectively available to the ocean carrier.

3. Respondents suggest that even if a hold would otherwise be appropriate, this Court should decide now to let these erroneous rulings stand, rather than await disposition of *Regal-Beloit*, because one Member of the Court sat on the *Sompo II* panel. Opp. 8-9. Respondents correctly concede that there is no reason for Justice Sotomayor to recuse herself from *Regal-Beloit* simply because she was a member of the *Sompo II* panel, which held only that it was bound by prior Second Circuit precedent directly on point (*Sompo I*). The mere pendency of these petitions cannot possibly change that analysis.

If Justice Sotomayor believed that her participation in the non-substantive *Sompo II* panel decision made it inappropriate for her to participate in considering *these* petitions then of course she could recuse herself from these petitions without affecting her participation in *Regal-Beloit*. The rest of this Court can and should resolve these petitions in the usual and appropriate manner without regard to that decision. If that somehow produced an evenly divided Court—which would of course favor *respondents*, who prevailed below—then so be it. (And for the record Union Pacific sees absolutely no reason why Justice Sotomayor should recuse herself from any of these matters.)

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Regal-Beloit* and then granted and reversed or remanded, as appropriate, in light of this Court's decision.

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